Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC., d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

On the Petition
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Questions Presented

Whether the National Labor Relations Board's (the "Board's") failure to consider the effect of the passage of time between an employer's violations of Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), amounts to an abuse of the Board's remedial authority?

Whether, in view of the property interests implicated, the Board may authorize broad union access to an employer's plant premises without a clear showing of the necessity for such extraordinary relief?

Whether a separate real estate firm may be found liable for an employer's unfair labor practices on a single integrated enterprise theory, absent a showing that the independent corporate entity exercised joint control over labor relations with the offending employer?

List of Parties

Petitioners are Three Sisters Sportswear Co., Bedford Cutting Mills Inc., Three Sisters Apparel Corp., Metropolitan Sweater Industries, Inc., United Knitwear Industries, Inc., Skylight Fashions, Inc. d/b/a Skylight Trading, 144 Spencer Realty Corp., and United Knitwear Industries, Ltd. Respondents are the National Labor Relations Board, and the International Ladies' Garment Workers Union, AFL-CIO (the "ILG").[1]

Rule 29.1 Listing

There is no parent company or subsidiary to be listed pursuant to Rule 29.1.

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[1] The ILG was an intervenor below.

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No.: _____

In The

Supreme Court Of The United States

October Term, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC., d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, denying the

petitioners' petition for review of an order of respondent National Labor Relations Board which found the petitioners jointly liable for a number of violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 158(a)(1), (3), and granting the respondent's cross-application for enforcement of its order.

Opinion Below

The Court of Appeals' judgment appears at PA: 1-3a.[2] The Court of Appeals' order denying petitioners' petition for rehearing and rehearing *in banc* appears at PA: 4a-7a.

Jurisdiction

The Court of Appeals entered judgment on April 28, 1995 (Buckley, Williams and Randolph, *per curiam).* On July 3, 1995, the Court of Appeals denied petitioners' timely petition for rehearing and rehearing *in banc.* This petition follows within 90 days of the Court of Appeals' denial of the petition for rehearing and rehearing *in banc.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] Numbers preceded by the letter "A:" refer to pages of the Joint Appendix submitted to the Court of Appeals. Numbers preceded by the letters "PA:" refer to pages of the appendix to this petition. Numbers preceded by the letter "E:" refer to those pages of the trial transcript that were annexed as exhibits to the Joint Appendix.

Constitutional and Statutory Provisions

Pursuant to this Court's Rule 14.1(f), the provisions involved in this petition appear verbatim at PA: 8a-10a. They are:

29 U.S.C. §§ 158 (a) (1), (3); 160(F)

Jurisdiction in the Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under Rule 15 of the Federal Rules of Appellate Procedure and pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f).

Statement of the Case

In this petition, we present three questions for this Court's review.

First, we ask the Court to review the propriety of the Board's failing to articulate its rationale for imposing extraordinary remedies upon an employer found to have violated the Act -- without considering the effects of an eight-year passage of time between violations. Well-settled principles of law dictate that the Board's authority is limited to imposition of remedial, as opposed to punitive, measures. Hence, we contend that the Board exceeds its authority where, as here, it fails to consider the effects of the considerable passage of time between violations of an employer and its purported predecessor, but nevertheless authorizes the most severe of available remedies for the petitioners' violations.

In addition, we contend that the Board presumptively infringes upon the employer's property interests in ordering an employer to afford a union broad plant access, without requiring a clear showing of the necessity for such relief. In this regard, this Court is respectfully asked to reaffirm the well-settled principles of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956), which, recognizing the significance of the employer's property interests, implicitly requires such an inquiry. Accordingly, this petition presents an opporuntity for the Court to establish the extent of the Board's burden where, as here, the remedy authorized by the Board so drastically implicates the employer's property interests.

Finally, we maintain that this Court should articulate the weight to be accorded each of four factors traditionally used by the Board to ascertain whether an independent corporate entity is a single integrated enterprise with an offending employer for purposes of assessing liability under the Act.[3] Absent a showing that an unrelated corporation and an offending employer exercised joint control over labor relations, single employer status should not be found. In this petition, we respectfully urge the Court to articulate the relative weight to be given each prong of the standard applicable to the single employer inquiry.

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[3] *See Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876 (1965).

Statement of Facts

This petition for certiorari arises out of the Board's determination that Three Sisters,[4] a ladies garment manufacturing and production plant, committed certain unfair labor practices between late 1988 and 1991.

Three Sisters (also referred to herein as the "employer") operates its plant at 144 Spencer Street in Brooklyn, New York. The building, owned by 144 Spencer Realty Corp. ("Spencer Realty") since 1982, had previously been occupied by a group of now-defunct entities (collectively referred to as "Southland-Metro"),[5] which had also been involved in garment manufacturing.

Employees of Three Sisters and Bedford Cutting Mills, Inc. ("Bedford") were covered by a collective bargaining agreement with Local 17-18, United Production Workers Union ("Local 17-18"), which extended between March 19, 1987 to March 19, 1990. During this period, Local 17-18 had regular access to the plant, and, when necessary, vigorously pursued employee grievances. [A: 36]

In December 1988, the ILG commenced an organizing campaign at the Three Sisters plant. Among its

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[4] The petitioners stipulated that Three Sisters Sportswear, Inc. and Three Sisters Apparel Corp. (hereinafter "Three Sisters") were a single integrated enterprise. [A: 17]

[5] The Southland-Metro entities consisted of Southland Knitwear, Inc. and Metropolitan Industries, Inc. [A: 15]

other efforts, ILG representatives openly enlisted the support of Three Sisters employees, and freely distributed leaflets and other ILG literature to the employees on and near the plant's premises. [E: 52-53] Three Sisters' principal, Beirel Jacobowitz, did nothing to hamper the ILG's distribution of ILG literature on the premises. [E: 53-54, 57-58]

Thereafter, however, a series of conflicts between Three Sisters management and certain employees were attributed to Three Sisters' purported animus against the ILG. These conflicts ultimately gave rise to the unfair labor practice charges that led to the Board proceedings below.

The Hearings And The Board's Order

Hearings on the unfair labor practice charges against Three Sisters were held over the course of twenty-two days, between June 24, 1991 and February 25, 1992 before an Administrative Law Judge ("ALJ"). Thereafter, the ALJ's recommendation, issued on January 15, 1993 [A: 13], and was adopted as modified in certain respects by the Board. 312 N.L.R.B. No. 133 (September 30, 1993). [A: 210]

Among other things, the Board affirmed the ALJ's decision: *(i)* determining that all of the petitioners herein collectively are single employers with and/or alter egos of one another, as well as alter egos of their purported predecessors, Southland-Metro; *(ii)* finding that the petitioners committed a number of violations of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3); and *(iii)* imposing a wide range of extraordinary notice and access remedies. [A: 210-11]

Liability On The Single Integrated Enterprise Theory

For purposes of liability, the Board alleged that petitioners Bedford, Metropolitan Sweater Industries, Inc., United Knitwear Industries, Inc., United Knitwear Industries, Ltd., and Skylight Fashions, Inc. are jointly single employers with and/or alter egos of Three Sisters.

The complaint was subsequently amended to add Spencer Realty as a respondent, on the theory that Spencer Realty was also a single employer with the petitioners. [E: 534] In addition, the ALJ ultimately reached the question whether the petitioners' purported predecessors -- Southland-Metro -- were a single integrated enterprise with the petitioners. The ALJ reached this question solely for purposes of evaluating the propriety of the extraordinary remedies sought by the ILG.

A. Spencer Realty

Although all violations were purported to have involved Three Sisters' employees, Spencer Realty -- along with the other petitioners -- was found to be a single employer with and alter ego of Three Sisters, and hence liable for Three Sisters' unfair labor practices under the Act.

On the one hand, we concede that Three Sisters, Bedford, United, and Skylight Fashions are engaged in various -- albeit distinct -- aspects of the ladies garment business. On the other hand, however, Spencer Realty, formed in or before 1982, is a real estate property management firm, with no involvement whatsoever in garment production. [A: 15]

Spencer Realty owns properties at least four different sites, including the building in which the other petitioners are located. [E: 548-49] However, other than some level of common ownership by members of the Jacobowitz family,[6] Spencer Realty's principals were never demonstrated to have exercised joint control over labor relations of Three Sisters. Nevertheless, the Board affirmed the ALJ's findings that this independent corporate entity was a single integrated enterprise with the petitioners, and imposed joint liability accordingly.

B. Southland-Metro

The ALJ also devoted considerable time to evidence ostensibly establishing that the petitioners herein are alter egos of two purported predecessors Southland-Metro.

Southland-Metro, which had ceased operations in 1983, had also been owned in part by members of the Jacobowitz family and engaged in garment manufacture. Prior to the cessation of its operations, the Southland-Metro entities were found to have committed unfair labor practices, based upon activities alleged to have occurred not later than 1980. *Southland Knitwear, Inc. and Metropolitan Industries, Inc.,* 260 N.L.R.B. 642 (March 4, 1982).

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[6] Various Jacobowitz family members own interests in all of the petitioners. Jack Jacobowitz holds a majority interest in Spencer Realty, together with his son Abraham, who possesses a minority interest in the company. However, neither is involved in the day-to-day operations of any of the other petitioners.

Commencing on January 21, 1992, during the pendency of the *Three Sisters, et al.* proceedings, the ALJ conducted a separate hearing on certain unresolved issues concerning Southland-Metro. These remaining issues were ultimately resolved by settlement on or about March 13, 1992. [A: 16-17]

Nevertheless, the ALJ decided, in *Three Sisters, et al.,* to reach "the connection between Southland and Metropolitan and the [petitioners], in order to determine the propriety of the special remedies that Charging Party [ILG] has requested" against the petitioners. [A: 17] It did so, finding that Southland-Metro was, indeed, a predecessor of the petitioners.

The Remedies

In addition to the traditional cease and desist order and other restitutionary relief, the Board affirmed, with slight modification, a series of extraordinary access and notice remedies recommended by the ALJ. [A: 68-69, 211] Notwithstanding the fact that more than eight years had elapsed between violations, the findings concerning Southland-Metro's predecessor status plainly weighed heavily in the ALJ's equation, given that the ALJ imposed remedies typically reserved for the most hardened of recidivists.

The extraordinary access measures grant the ILG broad access for up to two years to the Three Sisters plant. Among the most extreme measures, the order requires Three Sisters: (1) to permit ILG representatives access to non-work areas of the plant for presentation of ILG views on unionization during non-work periods; (2) to give the ILG notice of any meeting at which the employer addresses the employees on union representation, permit

ILG representatives to attend, and give the ILG equal time and access to address the employees on the same question; and (3) prior to any scheduled election at the Three Sisters' plant, to afford the ILG the opportunity and access to the plant to deliver a 30-minute speech to employees on working time.[7]

Among the special notice requirements, Three Sisters is required to: (1) mail copies of the Board's Notice, which has been personally signed by Three Sisters' principal, to those employed during the period of the unfair labor practices; (2) post the Notice at the plant for sixty days; (3) publish the Notice in two newspapers of general circulation, twice weekly for four weeks. In addition, the order compels Three Sisters principal Beirel Jacobowitz to attend an assemblage of employees convened for a "public reading" of the Notice, to be read either by Jacobowitz personally or by a Board agent.

Review of the Board's Order

On March 3, 1994, the petitioners filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia, and on March 21, 1994, the Board filed its cross-application for enforcement of the Board's order in the same Court. [A: 207, 214] Notwithstanding the punitive nature of the remedies imposed by the Board, and the paucity of rationale with respect to the most significant aspects of the Board's order,

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[7] In addition, the order requires Three Sisters to make available to the ILG the names and addresses of all employees, and grant the ILG access to bulletin boards and other places where notices to employees are customarily posted.

the Circuit Court disposed of petitioners' application and granted the Board's cross-application *without opinion.*

REASONS FOR GRANTING THE PETITION

Although we present three seemingly independent questions for the Court's review, each presents a common issue of great significance and requires that this Court clarify the scope of the Board's authority in imposing liability and crafting remedies under the Act. We respectfully submit that the outcome on the questions presented here underscores the necessity for this Court to circumscribe the limits of the Board's discretionary authority.

Indeed, under the circumstances of this case, the dangers of failing to define the scope of the Board's authority are self-evident: Not only has the Board grossly overreached the bounds of the Act's mandate to fashion remedies that are remedial (as opposed to punitive) in nature, but it has failed even to present a viable rationale for imposing the most harsh of these remedies.

In addition, in failing appropriately to weigh all factors determining the existence of a single integrated enterprise, the Board has impermissibly intruded upon intercorporate relations, the traditional domain of the states.

The Board's Failure To Consider The Effects Of The Passage Of Time Between Violations Of The Act Amounts To An Abuse Of The Board's Remedial Authority.

Southland-Metro's relationship with the petitioners weighed heavily in the equation in assessing the remedies

to be imposed upon the petitioners -- even though more than eight years had passed with no intervening violations.

However, given that such a considerable period of time had elapsed between violations of the Act, the passage of time between violations merited the Board's consideration. In failing even to consider this eight-year "clean period," the Board exceeded the scope of its authority and impermissibly imposed measures decidedly more punitive than remedial.[8]

More significantly, perhaps, the Board contravened the mandate of this Court, which requires that remedies fashioned by the Board "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) (Citations omitted). In order to assure the Board's adherence to this standard, this Court should mandate that the passage of time between violations must be evaluated. *See United Steelworkers of America v. N.L.R.B.*, 646 F.2d 616, 639 (D.C. Cir. 1981) (Emphasis supplied) (In the case of a recidivist violator, the effect of the passage of time between violations must be evaluated).

Plainly, such a mandate is necessary given the Board's order imposing the harshest of remedies upon the petitioners here. For, the extraordinary measures invoked here are typically justified only under circumstances in which an employer has exhibited a long history of flagrant

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[8] *See Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401 (D.C. Cir. 1981) ("the Board's powers are limited to remedial, and not punitive, orders").

and repeated violations -- a history of recidivism that the *ALJ himself* conceded was not present in this case.[9]

Plainly, the ALJ only reached the question of the petitioners' alter ego status with Southland-Metro *"in order to determine the propriety of the special remedies* that Charging Party [ILG] has requested" in connection with Three Sisters, *et al.* [A: 17 (Emphasis supplied)] However, *eight years* had elapsed between the misconduct committed by Southland-Metro and the wrongful acts alleged to have been committed by the petitioners. Nevertheless, no mention of the eight-year lapse was even made.

Yet it is plain that the ALJ indeed gave great weight to the violations of Southland-Metro, for it invoked unduly harsh and punitive measures typically reserved for the most hardened recidivists. In fact, the ALJ's approach illuminates the fundamental flaw in the Board's remedial order. Were Southland-Metro to be taken out of the equation, as it should have been, the ALJ, and the Board, in turn, would have had no legitimate basis for imposing the measures invoked here.

Indeed, the cases in which such extraordinary remedies were authorized are marked by a long and flagrant history of recidivism, requiring a multiplicity of charges by the Board typically spanning a period of many

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[9] Indeed, the ALJ explicitly stated that "[n]either the conduct here [n]or the frequency of the violations, approaches the record of *J.P. Stevens*." [A: 64 (Citation omitted)] The recidivist history of J.P. Stevens was examined by the District of Columbia Circuit in *Textile Workers Union of America, AFL-CIO v. NLRB,* 475 F.2d 973 (D.C. Cir. 1973).

years.[10] Moreover, resort to such extreme measures typically finds its justification in wrongful conduct on a grand scale, often affecting massive numbers of employees.[11] Finally, such cases typically involve a persistent pattern of direct involvement by top management, usually spanning a period of years and/or multiple locations.[12]

Here, by contrast, the violations, while serious if true, hardly approach the level and duration of pervasive

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[10] *See, e.g., Textile Workers of America, supra,* 475 F.2d at 974 (This Court had been "called upon to review the *twelfth in a series of orders* of the [NLRB], issued in what by now seems a quixotic attempt convince J.P. Stevens to respect the rights conferred on its employees by ... the [Act]"); *NLRB v. S.E. Nichols, Inc.,* 862 F.2d 952, 961 (2d Cir. 1988), *cert. denied,* 490 U.S. 1108, 109 S.Ct. 3162 (1989) (Referring to four prior Board decisions issued between 1972 and 1977, which "justified imposition of extraordinary access and notice remedies").

[11] *See, e.g., Conair Corporation v. NLRB,* 721 F.2d 1355, 1360 (D.C. Cir. 1983), *cert. denied sub nom,* 467 U.S. 1241, 104 S.Ct. 3511 (1984) ("Company conducted a series of unprecedented management-employee meetings in direct response to the Union's efforts").

[12] *See, e.g., S.E. Nichols, supra,* 862 F.2d at 955 (Top officers of company "aggressive[ly] campaigned against [ ] unionization," including meeting with groups of employees to discourage them from supporting the union); *Conair Corp., supra,* 721 F.2d at 1360-61 (Upper-level executives held multiple mass and small-session meetings with employees, warning of consequences of unionization).

and egregious misconduct in the foregoing circumstances. Most significantly, Three Sisters is more properly characterized as a "first offender" -- as opposed to a persistent J.P. Stevens-calibre recidivist -- because nearly eight years had elapsed between the instant proceeding and the misconduct in *Southland-Knitwear, supra.*

In sum, compared with the truly egregious and pervasive misconduct found in *Conair, S.E. Nichols,* and other authorities cited above, it is all but impossible to reconcile the Board's imposition of extraordinary measures here, rendering the Board's order hopelessly arbitrary. In order to ensure that the remedies fashioned by the Board are "sufficiently tailored to expunge only the *actual,* and not merely *speculative,* consequences of the unfair labor practices," *Sure-Tan, Inc. v. NLRB, supra,* 476 U.S. at 900, 104 S.Ct. at 2813, an explicit consideration of the passage of time between violations should be a necessary prerequisite to the Board's imposition of extraordinary measures.

The Board Must Meet Its Burden Of Making A Clear Showing Of The Necessity For Broad Union Access To An Employer's Plant.

A series of extraordinary measures requires the employer here to afford the ILG nearly unfettered access to the plant for a period of two years, even though no unique problems of union access were shown.[13]

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[13] The employer was never demonstrated to have intruded upon the ILG's leafletting efforts at its own front door. Indeed, the ALJ dismissed an allegation of unlawful surveillance. Moreover, as previously noted,

(continued...)

Moreover, the board did so without requiring, at minimum, a clear showing of the necessity for such broad plant access. Accordingly, absent such a clear showing, we contend that the broad access order authorized here should be deemed a presumptive infringement upon the employer's property rights.

Indeed, the outcome here directly affronts the principles in *NLRB v. Babcock, supra,* which acknowledged that access orders may run afoul of an employer's property rights. In this regard, the *Babcock* Court stated that:

> [The problem of plant access] is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accomodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.* The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.

NLRB v. Babcock, supra, 351 U.S. at 112, 76 S.Ct. at 684 (Emphasis supplied).

Although *Babcock* principles do not typically govern in cases granting union access as a remedial measure,

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[13](...continued)
Local 17-18 vigorously represented Three Sisters' and Bedford's employees' interests during the same period of time.

these principles nevertheless merit consideration where, as here, the Board utterly failed even to acknowledge the property interests involved. Given the significance of these property interests, we contend that this Court, in keeping with *Babcock*, should mandate that the Board sustain a heightened burden of making a "clear showing" of the necessity for such extraordinary relief, as a prerequisite for authorizing broad plant access.

Indeed, this heightened standard has previously been imposed upon the Board by the District of Columbia Circuit, stating that:

> Absent the necessity to counter these harmful consequences, access cannot be justified as a remedial measure and instead may directly affront the principles announced in [*NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956)]. As a result, before access may be imposed, it is critical that a clear showing be made that access is needed to reassure employees of the existence and vitality of protected legal rights.
>
> In granting access as a remedial measure, therefore, *a burden lies upon the Board to substantiate its conclusion that access is necessary* to offset the consequences of unlawful employer conduct.

United Steel Workers, supra, 646 F.2d at 639 (Emphasis supplied) (Remanding for appropriate clarification).

Here, however, the Circuit Court affirmed the Board's findings -- notwithstanding the fact that the Board

utterly failed to substantiate its conclusion that special access is necessary. The Board's order provided only that, "[w]e agree with the [ALJ] that these [special access] remedies are appropriate and necessary to dissipate the effects of the [petitioners'] flagrant and extensive unfair labor practices." [A: 210][14]

In sum, given the extraordinary scope of the access measures invoked and the breadth of property interests implicated, the Board must be required to make a clear showing of the necessity for such relief. Absent a mandate of this Court, the Board's discretionary authority will continue to run afoul of the principles espoused in *NLRB v. Babcock, supra.*

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[14] In this regard, the ALJ had stated, without exposition, as follows:

> Charging Party also requests a number of other special remedies providing for reasonable access to Respondents' premises and bulletin boards by the ILG in certain situations, plus supplying the ILG with names and addresses of their current employees. These remedies are traditionally provided by the Board, where as here, Respondents have engaged in flagrant and pervasive conduct rendering the possibility of fair election remote, and I find it appropriate to so recommend. (Citations omitted)

[A: 66]

Single Employer Status May Not Be Found Absent A Showing That The Independent Corporate Entity Exercised Joint Control Over Labor Relations.

This case also presents questions concerning the role of the Board in affecting the manner in which intercorporate relations are structured, and the extent to which the Board may intrude upon such relations.

Here, Spencer Realty, an unrelated corporate entity, was found to constitute a single integrated enterprise with the petitioners. However, such a finding of single employer status should not be found where, as here, the sole determining factor is common ownership. In so finding based upon the existence of a single factor, the Board exceeds its mandate to effectuate federal labor policy and inappropriately intrudes upon the state's overriding interest in the principles guiding corporations.

It is well-settled that, "[a]s in other areas of the law, corporations normally are treated as separate entities under the Labor Act." *United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir.), *cert. denied*, 439 U.S. 827, 99 S.Ct. 101 (1978). Accordingly, "[t]he Board treats multiple corporations as a single employer *only* when it is established that the nominally separate corporations are in fact operated as a single integrated business enterprise." *Id.* (Emphasis supplied).

This Court has established the four criteria, used by the Board in determining whether separate entities are "sufficiently integrated to be treated as one": *(i)* interrelationship of operations, *(ii)* common management, *(iii)* centralized control of labor relations, and *(iv)* common

ownership or financial control. *Radio & Television Broadcast Technicians Local Union 1264, supra,* 85 S.Ct. at 877 (per curiam) (Other citations omitted); *see also N.L.R.B. v. Al Bryant, Inc.,* 711 F.2d 543, 551 (1983). Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "'arm's length relationship found among unintegrated companies.'" *Local No. 627 International Union of Operating Eng. v. NLRB,* 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom,* 425 U.S. 800, 96 S.Ct. 1842 (1976).

While no factor is dispositive, the Board typically stresses the first three factors, with particular emphasis on whether control of labor relations is centralized, "which tend to show 'operational integration.'" *Al Bryant, supra,* 711 F.2d at 551, *citing, inter alia, Radio & Television Broadcast, supra; see also NLRB v. International Measurement & Control Co., Inc.("IMCO"),* 978 F.2d 334, 340 (7th Cir. 1992) ("the Board acts within its discretion in treating as a single employer firms that operate as an integrated enterprise *and 'exert[] significant control over' the employees in question.*") (Emphasis supplied) (Citation omitted). On the other hand, common ownership, which is "necessarily a feature of any conglomerate organization," is not determinative where common control is not shown. *United Telegraph Workers, supra,* 571 F.2d at 667 (Citations omitted).

Nevertheless, as disclosed by application of the four criteria established by this Court, the Board determined that Spencer Realty was a single integrated enterprise by relying almost exclusively upon the existence of common ownership.

First, common management was not present. Spencer Realty minority owner, Abraham Jacobowitz, son of Jack, was not demonstrated to have exercised any management control over the operations of any of the other petitioners [E: 692-96] Indeed, Abraham was studying at a Yeshiva for all of the relevant time period. [A: 20] Similarly, Jack Jacobowitz played no role in the day-to-day operations of Three Sisters and Bedford, which were run by principals Beirel Jacobowitz and David Jacobowitz, respectively. [E: 496, 595-91, 599]

Second, there was no interrelationship of operations, for Spencer Realty plays no role whatsoever in the garment manufacturing industry, or in the purportedly interrelated functions of the other entities. Spencer Realty is an entirely distinct real estate property management firm that owns at least four separate properties, including 144 Spencer Street. Indeed, the other petitioners were demonstrated to have remitted rent to Spencer Realty for their use of the premises, which were shared by other unrelated commercial tenants. [E: 489-92]

Finally, and most importantly, there was simply no evidence that Spencer Realty exercised labor control over -- or shared employees with -- Three Sisters and Bedford.

Under the ALJ's analysis, affirmed by the Board and upheld by the D.C. Circuit on review, virtually any affiliated corporation could be held liable for the labor obligations of a sibling corporation, so long as one of the factors -- common ownership, deemed the least important -- is met.

Hence, too heavy a reliance upon the factor of common ownership -- a characteristic of many corporations -- can result in an impermissible intrusion by the Board

into corporate relations. Accordingly in light of the circumstances presented here, it is well within this Court's authority to clearly articulate the weight to be given each of four factors traditionally relied upon to establish single employer status. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182, 92 S.Ct. 383, 399 (1971) ("the legal standard to be applied is ultimately for the courts to decide and enforce").[15]

Conclusion

This petition for certiorari should be granted.

Respectfully submitted,

JUDD BURSTEIN, P.C.
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(212) 681-0606

On the Petition
Judd Burstein, Esq.
Kathryn A. McLaughlin, Esq.

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[15] The factors that enter into the Board's determination of alter ego status are similar to those considered in the context of a single employer analysis; *i.e.*, substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old entity and its successor. *See Al Bryant, supra,* 711 F.2d at 553-54. Hence, for the same reasons, the Board's determination that Spencer Realty was an alter ego of the petitioners was also in error.

APPENDIX

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

THREE SISTERS SPORTSWEAR CO.; BEDFORD CUTTING MILLS, INC.; THREE SISTERS APPAREL CORP.; METROPOLITAN SWEATER INDUSTRIES, INC.; UNITED KNITWEAR INDUSTRIES, INC.; SKYLIGHT FASHIONS, INC., D/B/A SKYLIGHT TRADING; 144 SPENCER REALTY CORP.; UNITED KNITWEAR INDUSTRIES, LTD.,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Intervenor

No. 94-1169

Appendix A
Order of the United States Court of Appeals

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITIONS FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before BUCKLEY, WILLIAMS, and RANDOLPH, *CIRCUIT JUDGES.*

JUDGMENT

These causes were considered on the record from the National Labor Relations Board and were briefed and argued by counsel. After full review, the court is satisfied that appropriate disposition does not warrant an opinion. See D.C. Cir. R. 36(b). On consideration thereof and substantially for the reasons set forth in the Board's decision herein, it is

ORDERED AND ADJUDGED by the court that the petitions for review be denied and the Board's cross-application for enforcement of its order be granted.

Appendix A
Order of the United States Court of Appeals

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

PER CURIAM

For the Court:

Mark J. Langer, Clerk

Filed: April 28, 1995

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

Three Sisters Sportswear Co., et al.,

Petitioners,

v.

National Labor Relations Board,

Respondent

---

and Consolidated Case No. 94-1169

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentellle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Petitioners' Suggestion For Rehearing *In Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

Appendix A
Order of the United States Court of Appeals

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Filed: July 3, 1995

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

Three Sisters Sportswear Co., et al.,

Petitioners,

v.

National Labor Relations Board,

Respondent

---

and Consolidated Case No. 94-1169

BEFORE: Buckley, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed June 12, 1995, it is

Appendix A
Order of the United States Court of Appeals

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Filed: July 3, 1995

Appendix B
Statutory Provisions

SECTION 8 OF THE ACT, 29 U.S.C. §158 (a) (1), (3) -- U N F A I R L A B O R PRACTICES

(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) ' by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the

employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SECTION 10 OF THE ACT, 29 U.S.C. §160(f) -- PREVENTION OF UNFAIR LABOR PRACTICES -- POWERS OF BOARD GENERALLY

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith

transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Supreme Court, U.S.
FILED

(2) 95-641 OCT 2 - 1995

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC., d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX

On the Petition
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135 pp

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Decision of the National Labor Relations Board and Order

JD(NY)--100-92
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

Case Nos. 29-CA-14046 29-CA-1495 29-CA-14517 29-CA-14518 29-CA-14535 29-CA-14617 29-CA-14625 29-CA-14758 29-CA-15095 29-CA-15646 29-CA-15653 29-CA-15720 29-CA-15740 29-CB-7505

THREE SISTERS SPORTSWEAR CO.;
BEDFORD CUTTING MILLS, INC.;
THREE SISTERS APPAREL CORP.;
METROPOLITAN SWEATER INDUSTRIES, INC.;
UNITED KNITWEAR INDUSTRIES, INC.;
UNITED KNITWEAR INDUSTRIES, LTD.;
SKYLIGHT FASHIONS, INC., D/B/A
SKYLIGHT TRADING AND 144 SPENCER REALTY CORP.

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

and

Supplemental Appendix A
Decision of the National Labor Relations Board and Order

LOCAL 17-18, UNITED PRODUCTION WORKERS' UNION, AFL-CIO

and

LOCAL 17-18, UNITED PRODUCTION WORKERS' UNION, AFL-CIO
(THREE SISTERS SPORTSWEAR CO.; BEDFORD CUTTING MILLS, INC.; THREE SISTERS APPAREL CORP.; METROPOLITAN SWEATER INDUSTRIES, INC.; UNITED KNITWEAR INDUSTRIES, INC.; UNITED KNITWEAR INDUSTRIES, LTD.; SKYLIGHT FASHIONS, INC., D/B/A SKYLIGHT TRADING AND 144 SPENCER REALTY CORP.)

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Elias Feuer, Esq.,
Counsel for the General Counsel,
Brooklyn, New York

Stuart Bochner, Esq.,
(Horowitz and Pollack, P.C.)
South Orange, New Jersey
for Respondent Employers;
Sol Bogen, Esq.,
New York, New York
for Respondent Union;

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Decision of the National Labor Relations Board and Order

Thomas Kennedy, Esq.,
and Arthur Schwartz, Esq.,
(Lewis, Greenwald, Kennedy,
Lewis, Clifton and Schwartz, P.C.)
New York, New York
for Charging Party

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to numerous charges filed in the above-entitled cases by International Ladies' Garment Workers' Union, AFL-CIO, herein called the ILG, the Union, or Charging Party, the Director issued a number of complaints, including an Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, issued on June 13, 1991, which alleges in substance that Three Sisters Sportswear Co., herein called Sportswear, Three Sisters Apparel Corp., herein called Apparel, or collectively called Three Sisters, Bedford Cutting Mills Co., herein called Bedford, Metropolitan Sweater Industries., Inc., herein called Metro-Sweater, United Knitwear Industries, Inc., herein called United Inc., United Knitwear Industries, Ltd., herein called United Ltd., and collectively called United, Skylight Fashions, Inc., d/b/a Skylight Trading, herein called Skylight and collectively called Respondent Employers, or Respondents, are a single integrated business enterprise, and have violated Section 8(a)(1) of the Act by threats, warnings, interrogations, promises of benefit, surveillance,

creating the impression of surveillance, and physically removing an employee from the plant, Section 8(a)(1) and (2) of the Act by threatening and promising employees' benefits to induce them to support Local 17-18 United Production Workers' Union, herein called Respondent Union or Local 17-18, offering to Local 17-18 to engage in surveillance employees to learn the identity of ILG supporters and disclose said information to Local 17-18 and by circulating and urging employees to sign a petition in support of Local 17-18, and Section 8(a)(1) and (3) of the Act by discharging or laying off employees Rosita Chalston, Carmen Nieves, Bella Martinez, Nidia Rodriguez, and constructively discharging its employee Israel Galarza, because said employees supported and assisted the ILG and Section 8(a)(1) and (4) of the Act by issuing a disciplinary warning to, and laying off and subjecting Chalston to closer supervision, because she had been the subject of previous charges filed on her behalf. The Complaint also alleges that Local 17-18 violated Section 8(b)(1)(A) of the Act by in the presence of employees accepting the offer of Respondent Employers to engage in surveillance of employees concerning their union support and disclose said information to Local 17-18, thereby creating the impression of surveillance of their activities on behalf of the ILG.

During the course of the trial which was held over the course of twenty-two days between June 24, 1991 and February 25, 1992, the Complaint was amended to include 144 Spencer Realty Corp., herein called Spencer as an additional Respondent and as part of alleged single integrated enterprise of Respondent Employers. Finally, on October 1, 1991, I granted General Counsel's motion to

consolidate two additional cases, which complaints alleged additional discriminatory layoffs of Chalston plus an unlawful discharge of employee Silvia Silverio.

Briefs have been filed by General Counsel, Respondent Employer, and Charging Party. Respondent Union presented oral argument. Based on the entire record[1], including my observation of the witnesses and my after due consideration of the briefs and oral argument, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Each of the named Respondent Employers are New York Corporations which are located at 144 Spencer Street, Brooklyn, New York. All but Spencer are engaged in some phase of the process of the manufacture, sale and distribution of knitwear goods and related products. Spencer is a real estate corporation which owns and manages the facility at 144 Spencer Street, as well as several other buildings. Annually, Respondent Employers, in the course of their business' purchased and received at their Spencer Street facility, knitwear goods and other goods and materials valued in excess of $50,000 directly from points located outside the State of New York. Respondent

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1 While every apparent or non-apparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony. Therefore, anhich is inconsistent with my findings is hereby discredited.

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Employers are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Additionally, the ILG and Local 17-18 are and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

II. PRIOR RELATED CASES SOUTHLAND, KNITWEAR, INC. AND METROPOLITAN INDUSTRIES, INC. CASE NOS. 29-CA-7765, 29-CA-8096 260 NLRB 642 (1982)

On March 4, 1982, the Board issued its decision in the above-entitled case, affirming the ALJ's recommendation that Southland Knitwear, Inc., herein called Southland, and Metropolitan Industries, Inc., herein called Metropolitan, a single integrated enterprise, violated section 8(a)(1), (2) and (3) of the Act. The agents of the Respondent therein, who committed the various unfair labor practices were Jack Jacobowitz and three of his children Beirel, Leibish[2], and Sylvia. The violations found included threats to employees of discharge and or plant closure if they supported ILG or if they refused to support Local 413, Office and Professional Employees International Union, AFL-CIO herein called Local 413, interfering with the distribution of ILG literature, admonishing employees not to speak to ILG representatives, telling employees that the ILG representative was from the MAFIA, soliciting and forcing employees to sign authorization cards for Local 413

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2 Leibish shall be referred to by his legal name of David.

and granting employees benefits to induce them to Support Local 413 and/or to abandon their support for ILG, the laying off of approximately 83 employees because of their support for ILG and their refusal to support Local 413, and conditioning the recall of employees upon abandonment of ILG, and enforcing a long dormant collective bargaining agreement with Local 413, including the deduction of dues from employees' paychecks. The Board also modified the ALJ's recommended Order to provide for a broad cease and desist Order, inasmuch as it found that the Respondent therein had committed "egregious and widespread unfair labor practices."

On May 5, 1983, Southland and Metropolitan, by its attorney, entered into a Stipulation with the Board, waiving its rights to appeal the underlying decision, in exchange for the Board's refraining from seeking enforcement. The Stipulation also reflects that the Respondents are not precluded from litigating the question of backpay due to the employees, and that Respondents will make records available to the Board necessary for the computation of backpay due.

Southland and Metropolitan purportedly shut down their operations at 144 Spencer Street, in mid-September of 1983. Apparently, at some point undisclosed by the record, the Region received information that these corporations may still be operating at that location, but under the names of the various Respondents in the instant case. Consequently, on June 13, 1989, the Region issued a Backpay Specification and Notice of Hearing in Case Nos. 29-CA-7765 and 29-CA-8096, which alleged *inter alia* that all

the named corporations in the instant case (except for Spencer) were since on or about October 1983, a single employer, alter ego with and or successor to Southland and Metropolitan, and that all of these corporations were jointly and severally liable for making whole the discriminatees for the loss of the pay they suffered by reason of the discrimination against them. Subsequently, a number of amendments were issued to this specification, and the hearing therein opened before me on January 21, 1992. After much discussion, it was decided to defer litigation of the issue of whether the various operating entities were responsible for remedying the unfair labor practices of Southland and Metropolitan, until the record was complete in the instant case, when it would be decided what portions of this record would be incorporated into the record of the Backpay Hearing.

On March 13, 1992, the parties entered into a Stipulation settling the backpay matter, which I subsequently approved. The Stipulation provides that all of the named Respondents herein including Spencer, would be jointly and severally liable for the full amount of the backpay owed by Southland and Metropolitan pursuant to the Board Order which would be satisfied by the payment of some $340,000 in installment payments between May 1992 and April 1, 1994. The Stipulation also provided that the agreement does not constitute an admission that the corporations involved are a single employer or that they are alter egos and/or successors of or to each other and/or to Southland or Metropolitan.

Supplemental Appendix A
Decision of the National Labor Relations Board and Order

III. THE SINGLE EMPLOYER ISSUE

A. FACTS

The preliminary question to be decided is whether it is necessary or appropriate for me to make findings as to the single employer issue in the instant case. I had initially raised this issue myself particularly in view of the pendency at that time, of the Backpay Hearing wherein the identical issues would have to be litigated and decided. That possibility has now bee eliminated, in view of the settlement of the other case, without a determination of the issues involved herein.

However, the issue is still present, especially since Respondents have taken the position that the single employer issue need not and should not be decided at this time. In that connection, Respondents contend that the employer of all the employees involved herein is Three Sisters[3], and that there is no need to decide the question of the alleged relationship between Three Sisters and the other companies, unless and until it becomes necessary in a compliance proceeding.

General Counsel argues on the other hand that the ALJ must decide all complaint allegations. *Cardio Data Systems Corp.* 264 NLRB 37 (1982). General Counsel also argues that since an extensive record has been made in the

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3 Respondent concedes that the two Three Sisters entities, Three Sisters Sportswear, and Three Sisters Apparel Corp., do constitute a single employer.

present case, it is essential for a determination to be made on that record so that proper legal responsibility for Respondents actions can be enforced, with the possibility of contempt against all of the possible violators, in the event of future violations.

Charging Party emphasizes the "egregious" violations committed by Southland and Metropolitan in the prior case, and urges that a finding that the present entities are an alter ego of or single employer with these other corporations is essential to prevent future violations by Respondents, and to justify various special remedies requested by Charging Party in the current case.

I am persuaded that it is appropriate for me to decide the issue in this case. The matter has been litigated extensively, which included several instances of District Court enforcement of subpoenas, before Respondents turned over relevant documents. I do not believe that *effectuation of the Act would be enhanced by postponing a decision* on this issue, requiring the duplication of such litigation, in the event Respondents do not comply with the decision. Moreover, the connection between Southland and Metropolitan and the present companies must be decided, in order to determine the propriety of the special remedies that Charging Party has requested.

Accordingly, I shall decide the issues of whether the Respondents herein constitute a single employer as well as whether these Respondents constitute an alter ego of or single employer with Southland and Metropolitan.

Supplemental Appendix A
Decision of the National Labor Relations Board and Order

In that connection, the prior decision found that Southland and Metropolitan were engaged in the manufacture, sale and distribution of knitwear goods and related products at 144 Spencer Street in Brooklyn. Prior to 1973, Southland and Metropolitan had operated under the name High Point Hosiery located at Park Avenue, Brooklyn.

In 1973, the Company's name was changed from High point to Southland and Metropolitan when it moved to the sixth floor on 144 Spencer Street. On August 13, 1973, an account was opened with Brooklyn Union Gas Co. for gas supplied to four heating units and a hot water heater, located at 144 Spencer Street. According to records from Brooklyn Union Gas, this account has been continuous from 1973 to date, and that at least from 5/7/84, the bill has been sent care of Bedford Cutting Mills. These records do not establish what floors are involved with this account. The Brooklyn Union Gas records also established a separate Brooklyn Union Gas account for Three Sisters, opened on October 9, 1984, which covers the fifth floor at 144 Spencer Street.

Although the prior case found the Respondents therein to be a single integrated enterprise consisting of Southland and Metropolitan Industries, (herein called Metro), it appears that the Respondent therein was also operating under the names of Metropolitan Form Industries (herein Form), and Metropolitan Sweater Industries, (herein Metro-Sweater). Collectively, I shall refer to the entire entity as Southland-Metro.

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Decision of the National Labor Relations Board and Order

Thus, Southland opened a payroll checking account at Merchant's bank, with Jack and David Jacobowitz as signatories. The signature card discloses that Southland was introduced to the bank by Form. Form filed the Federal Quarterly wage report on behalf of Metro's employees, and Form and Metro have identical taxpayer ID numbers of 11-23-01746.

On June 13, 1978, the title of a checking account with the Merchants Bank was changed to Metro Sweater, with Jack and David Jacobowitz again signatories, as president and treasurer[4]. In 1979, the employees were issued W-2 forms by Metro, but in 1981 and 1982, the same employees were issued W-2 forms by Southland and Metro-Sweater respectively, both of which shared a common ID number of 11-25533373.

Employee Ausemzia Lugo was hired at 144 Spencer Street on the sixth floor, in June of 1979, (under her maiden name, Francasca Aguilar), and during her tenure, which lasted until 1991, (with a maternity leave included), she was paid by either Southland or Metropolitan[5] at various times. Her uncontradicted and credited testimony established that prior to September of 1983, Beirel Jacobowitz was the direct supervisor of the machine operators of the Southland-

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4 This checking account was maintained until at least January 31, 1985. Additionally, Metro Sweater filed a document dated October 14, 1983 with the Merchants Bank, indicating that any one officer of the corporation was authorized to sign or endorse checks, and that Jack or David Jacobowitz were the officers so designated.

5 She did not indicate which Metropolitan entity paid her, although her 1982 W-2 form was issued by Metro Sweaters.

Metro entity, who worked on the sixth floor at 144 Spencer Street. During that same period of time, the cutting department was also on the sixth floor, and was supervised by David Jacobowitz.

As noted above, in May of 1983, Respondent Southland Metro entered into a stipulation, waiving its rights to appeal the underlying decision by the Board, and leaving for future determination the question of backpay due to the 83 employees discriminated against.

In mid September of 1983, Beirel met with the sewing machine operators of Southland Metro, and notified them that they would be moving to the fifth floor in two weeks. The employees were instructed by Beirel to past labels on their machines with their names on it.

Two weeks later, on October 2, 1983, fifty one former Southland Metro employees, including Lugo reported for work on the 5th floor, where Beirel directed these employees to use the same machines that they had labeled with their names and operated previously on the 6th floor. As of October 2, these employees were placed on the payroll of Three Sisters.

Three Sisters had formerly been located on 84 North 9th Street, Brooklyn, and had moved to 144 Spencer Street in late May or early June of 1983. Three Sisters' payroll ending September 25, 1983 consisted of thirty four employees. Its payroll for the week ending October 9, 1983 consisted of 94 employees, including 50 former Southland-Metro employees who were listed by Three Sisters as new

hires, along with 12 other employees listed as new hires, who had not previously been employed by either Southland-Metro or Three Sisters.

The cutting department employees remained on the sixth floor, and continued to be supervised by David Jacobowitz. At some point, undisclosed by the record, the cutting department employees were transferred to the payroll of Bedford Cutting Mills, Inc., herein called Bedford. At other points, also not disclosed by the record, the cutting department employees employed by Bedford moved to the fourth floor at 144 Spencer Street, and subsequently were transferred from Bedford's payroll to the payroll of Three Sisters. All the corporate offices of Bedford were held by Abraham Gutman, who is Jack Jacobowitz's son-in-law and who is married to Jack's daughter Sylvia. However, the evidence discloses that the cutting department employees have been supervised by David Jacobowitz directly, under the overall supervision of Beirel. While Gutman as noted is the only corporate officer listed, there is no evidence that he played any active role in the running of the business.

As for Three Sisters, when it commenced operations, its only officers, were Jonathan and Eva Mandel, who were not related to the Jacobowitzs. However, it is clear that Beirel continued to run the operation on a day to day basis, even after the transfer of employees to the Three Sisters payroll. Jonathan Mandel was involved in supervising employees for a period of several months, until early in 1984, when he disappeared from any active role in the business. The Mandels signed Three Sisters' tax returns for 1982, and received salaries of $12,000 for Jonathan and

$3,200 for Eva that year. The 1983 tax return provided for no salary to either Mandel, notwithstanding the fact that its gross income rose from $400,000 to $1,3319,728. In their 1984, 1985 and 1986 returns, Three Sisters did not show any salary to the Mandels or to any other officer. At some point, not disclosed by the record, but prior to 1986, Martin Weingarten, and his wife Leah, a daughter of Jack Jacobowitz, became officers of Three Sisters. However, once again the record does not disclose any evidence that either Weingarten played any direct role in running the business.

In January of 1984, a document was executed at Three Sisters' bank listing Jonathan Mandel and Abraham Jacobowitz as president and secretary of Three Sisters, and as the two individuals with authority to sign checks on behalf of Three Sisters. Abraham Jacobowitz is a son of Jack and a brother of Beirel, who has been at all time material herein a full time student studying at Yeshiva, and who has never actually performed any work for Three Sisters or any other of Respondents' corporations. However, at the instruction of his father Jack, Abraham gave his brother Beirel the authority to sign his (Abraham's) name on any documents involved in the various companies controlled by the Jacobowitzs.

Jack Jacobowitz consistently attempted to disclaim any knowledge of a connection between Three Sisters and the other entities involved, and sought to portray Beirel's employment there as a mere coincidence. I found Jack Jacobowitz who testified as a 611(C) witness and in connection with the question of the existence of certain

records, not to be believable. He responded to most questions, "I don't know", or "I do not remember", and I am convinced that he was able to answer many of these questions, but he simply chose not to do so. Thus, I have not credited him in various respects, where his testimony conflicts with other findings that I have made below.[6]

However, I do rely on the following testimony of Jacobowitz as an admission against the various Jacobowitz entities. Thus, Jack Jacobowitz was asked when he first found out that his son Beirel was going to be working at Three Sisters? His response was as follows:

> "I don't know when I found out. You have to ask him. I have no idea when. Probably, he came around asking, I gave him a job. I said yes, I gave him a job. he's entitled to make a living."

Later on in his examination, Jack Jacobowitz repeated this revealing admission, when he testified referring to Beirel, "but he asked me, I want the job, so I gave him the job."

At approximately the same time that Three Sisters hired the Southland-Metro employees, Jack Jacobowitz formed several additional corporations which operated out of the same 144 Spencer Street location. They were United Knitwear Industries, Ltd., herein Ltd., and United Knitwear

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[6] For example, as discussed below, I do not credit Jacobowitz that equipment was sold to Three Sisters by Southland-Metro.

Supplemental Appendix A
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Industries, Inc., herein Inc., and collectively called United[7], and Skylight Fashions, Inc., herein called Skylight. Jack Jacobowitz owns 51% of each of these corporations, with his sons Beirel and David owning 24.5% of said companies, which are subchapter (S) corporations.

United became the coordinating arm of the operation. Thus, purchasing was done by United, cutting by Bedford, the sewing, cleaning, hanging, packaging and shipping by Three Sisters, sales and collections by United, and by Skylight. Thus the record discloses that the various Jacobowitz entitles occupied floors 4, 5 and 6 at 144 Spencer Street. The building has two large signs on the outside, which refer only to Skylight of all of the Respondents.

The testimony of employee Israel Galarza supported by the testimony of employee Brigida Padilla, as well as various documents submitted into evidence, established significant functional integration between the companies. Thus, when fabric is delivered to 144 Spencer Street, it is loaded on the elevator by employees normally employed and paid by Bedford on the 4th Floor.[8] These employees take the fabric to the 6th floor, where it is stored. The 6th floor also was used to store spare parts, old sewing machines and corporate records. These Bedford employees retrieve the fabric from the 6th floor and transport it to the 4th floor, where it is cut at the cutting tables by Bedford employees.

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[7] Respondent concedes that Inc. and Ltd. are a single integrated enterprise.

[8] Note where, that as detailed above, the Bedford employees at one point were transferred to the payroll of Three Sisters.

After the fabric is cut, it is placed into bundles and sorted by colors, at other tables on the 4th floor by employees of Bedford and at times assisted by employees of Three Sisters[9].

The bundled fabrics are then transported to the 5th floor by the Bedford employees, wherein they would be distributed to the merrow and singer sewing machine operators employed by Three Sisters who produce a finished garment. Next, floor workers employed by Three Sisters cut the threads, clean, ticket, place the garments on hangers and in plastic bags, and send the garments by a conveyor pipe to the 4th floor, where they are packed and shipped.[10]

The entire operation is overseen by Beirel who moves from floor to floor, and supervises employees on all three floors. Beirel utilizes a loudspeaker system and a walkie talkie to communicate announcements to employees and/or orders or requests to supervisors from floor to floor. David Jacobowtiz continued to be the direct supervisor of the cutting department employees, as he had been at Southland Metro.

Galarza's uncontradicted and credited testimony also establishes a significant admission on the part of

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[9] These Three Sisters employees normally worked on the floor for Three Sisters, but on occasion were told by their manager to help out on the 4th floor.

[10] It is not clear whether the employees who perform the packing and shipping functions on the 4th floor were employed by Bedford at one time, or by Three Sisters all along. As noted above, at some point all the employees were transferred to the Three Sisters payroll.

Respondents. In October of 1984, Galarza, who would at times bring the mail to Respondents from downstairs to the 5th floor, noticed mail addressed to United. Galarza asked Beirel about United since he was not familiar with that name. Beirel instructed Galarza that when he sees mail for United, "it's for us". Beirel added that "United is the same thing as Three Sisters". Beirel also told Galarza that Metropolitan Industries, Inc. was "another of the names that the company had".

I also conclude in agreement with General Counsel that the title of the sewing machines, previously owned by Southland Metro was acquired by United. I make this finding based on an examination of the depreciable assets of Southland Metro, United, and Three Sisters. In this connection, I do not credit the contradictory testimony of Jack Jacobowitz that the machinery was sold directly to Three Sisters by his sons on behalf of Southland Metro, or David Jacobowitz that the machines were sold at an auction. I note particularly the absence of any documentation to support either of these assertions, as well as the fact that the testimony of the two principals of Respondents conflict with each other on this point.

Additionally, some companies from whom United and/or Skylight purchased goods in 1984 and 1985, continued to the old Order Acknowledgment Forms that had been used in connection with their prior purchases from Southland-Metro, more precisely from Metropolitan Industries, Inc. The invoices involved generally reflected that the goods were sold to United and shipped to Skylight, with the order acknowledgment from Metropolitan

Industries. On these forms, United Knitwear, Inc. at the 144 Spencer Street address was added to the Metropolitan form with the designation "New Address".

More importantly, the record is replete with evidence that United mad payments to vendors on behalf of Three Sisters, Bedford and/or Skylight for various supplies, services and labor, including newspaper ads, leasing of sewing machines, purchase of a bagging machine, hangars, knives, garments and other materials. Respondents adduced no evidence or explanation as to why United made these purchases.

Alan Feinsilber is utilized as the accountant for all of the corporations involved, and he prepares the tax returns for these entities. The record reveals that he was paid with a United check for services rendered to Bedford and Three Sisters, as well as to United. Feinsilber addresses correspondences to United at 144 Spencer Street, even where the matters discussed in the letter relates to Three Sisters, Skylight, or Bedford.

There is one office area on the fifth floor at 144 Spencer Street for all the corporations, which includes the offices of Beirel, David and Jack, as well as the clerical and bookkeeping staff of each company.[11]

The letterheads of both Skylight and United describe themselves identically as "manufacturers of Ladies and

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[11] All the companies used in addition to employees, Barbara Blatt, an independent contractor to perform bookkeeping services for them.

Children's Quality Knitwear." During 1990, one vendor, New York Sewing Machine Attachment Co. invoiced United and Skylight's accounts receivables, had United Knitwear written on the top, and was returned by Burlington with an invoice summary of quarterly sales to United. It was also common practice for banks, customers and other creditors of United and Skylight to require these companies to execute either of these companies. The record reveals that Jack Jacobowitz on behalf of both companies has executed such cross corporate guarantees. Additionally Feinsilber admitted and the record discloses that he considered United and Skylight to be affiliates under IRS rules, and reports transactions between these companies as "related parties transaction". For the years 1989 and 1990, 100% of United's sales were made to Skylight[12]. For the year ending June 30, 1990, Skylight paid 68.4% of its contractor expenses to United. During the fiscal year ending March 31, 1990, Three Sisters and Bedford comprised 57.6% and 17.1% respectively of United's contractor expenses for that year. For the last year in which Bedford filed a tax return, ending October 31, 1986, 98% of Bedford's sales were made to United and Skylight. Bedford does 100% of United's cutting.

Significant and substantial evidence of a connection between the corporations was demonstrated by a number of documents relating to insurance policies and coverage. Thus, on June 19, 1987, David Jacobowitz signed a document from MSP Insurance Trust, (MSP) involving an

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[12] For 1984, 97.5% of Three Sisters' Income came from United.

insurance claim of an employee, which indicates that the employee is actively working full-time for "Bedford, Three Sisters, United". The document also reflects, under David Jacobowitz's signature that "these three companies (Bedford, Three Sisters and United) are interrelated, located on the same premises and have the same officers."

Prior to April 1987, monthly invoices from MSP, covering insurance for David, Beirel and Jack Jacobowitz were addressed to Metro Sweater and paid by checks from United. As of April 1, 1987, invoices with the same MSP billing account number covering the same employees, were then addressed to United, Bedford, Three Sisters, and were still paid by United. In the fall of 1989, Three Sisters and United were jointly invoiced for a Blue Shield and Blue Cross policy covering the Jacobowitz's plus the other clerical employees, and a disability policy covering David Jacobowitz, which were both paid by United checks.

In July of 1988, United was contacted by the New York State Workers' Compensation Board requesting proof that its employees were covered by a compensation policy. United replied, enclosing a binder from PSM Insurance Co., reflecting insurance coverage for United and/or Bedford and/or Skylight and/or Spencer Bruce Ltd. at 144 Spencer Street, listing the business as "Sportswear Mfg."

On January 3, 1989, United was sent a notice from the State insurance Fund, indicating that the policy for all the companies has been cancelled "at your request". United responded by letter dated January 10, 1989, stating that it did not want to cancel the policy, but only to eliminate

Skylite, Spencer Bruce or Bedford, and continue the policy only for employees of Three Sisters and United.

On March 23, 1989, a commercial insurance policy was issued by North River Insurance Co. covering United, Three Sisters, Skylight, Bedford, Spencer Bruce, and Spencer Realty Co. Subsequently, Royal Insurance Co. of America became the insurer with a policy from 1991-1992 covering all of the above companies with the exception of Spencer Bruce.

Finally, it appears that the employees of Bedford (when Bedford had employees) and those employees employed by Three Sisters were covered by the some collective bargaining agreement with Local 17-18 United, Production Workers' Union, AFL-CIO.

As for 144 Spencer Realty Co. (Spencer), this entity on September 9, 1982, purchased the building at 144 Spencer Street, Brooklyn, New York, which also included addresses of 132 and 164 Spencer Street and 700 Myrtle Avenue. Jack Jacobowitz is the majority shareholder of Spencer, with his son Abraham also holding a small amount of shares in the company. Spencer's current checking account was opened at Mfg. Hanover Trust, on September 16, 1982, with the taxpayer ID number of 11-2553373 the same as used by Southland and Metro Sweater. The signatories on the account were David or Abraham Jacobowitz.

As noted above, Abraham Jacobowitz authorized his brother Beirel to sign his name, which authority Beirel

utilized with respect to Spencer as with other of the entities involved. In fact, Beirel and David Jacobowitz shared the day to day running of Spencer, along with their similar responsibilities with respect to Three Sisters and Bedford. In this connection, Beirel received legal documents and correspondences on behalf of Spencer addressed to him and signed checks and leases on behalf of Spencer under his alias "Abraham" Jacobowitz.

Spencer shares office space and clerical employees with the other companies herein on the 5th floor at 144 Spencer Street. Additionally, Spencer also uses Feinsilber as its accountant.

Since no leases between Spencer and Southland Metro, Three Sisters, Bedford, United or Skylight were produced pursuant to subpoena, I agree with General Counsel that it is appropriate to infer which I shall do that no such leases were executed between these parties.[13]

When Spencer purchased the building in September of 1982, Southland-Metro was located on the 6th floor, and paid rent to Spencer through September 1983. Southland-Metro's rent payments would fluctuate, and in some months, it made no payments at all. From January through June of 1983, its rent payments to Spencer ranged from $3,500 to $4,500 per month. In July of 1983, it made no payments, but in August Southland Metro made two $2,500 payments. Bedford began making rent payments in July of 1983 of

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[13] I note further that Respondent adduced no evidence that such leases were ever in existence.

$1,500. In September, Southland-Metro's last month of paying rent, it paid $2,500 and Bedford $1,500.

Three Sisters began paying rent in June of 1983 at a rate of $2,187.50 per month. in October when Southland Metro ceased paying rent, Three Sisters' rent was increased by $1,458.33 to $3,645.83. Bedford paid no rent for October of 1983. In November 1983, United paid the rent for Three Sisters of $3,645.83, while again Bedford paid no rent. Bedford paid $1,500 for rent in December of 1983, while Three Sisters made no payments.

In January of 1984, Bedford's rent was increased to $2,500 and paid such rent for January, February and March. Three Sisters paid its rent of $3,645.28 during these months. However, during April and May of 1984, neither Three Sisters nor Bedford paid any rent. Bedford missed payments in July 1984 and January 1985. There is no evidence that any of the above-detailed rent delinquencies of Three Sisters and Bedford were ever satisfied. However, United made a loan to Spencer of $5,000 in March 1984, $12,500 in May of 1984 and $3,000 in May of 1985. No evidence was adduced that Spencer ever repaid any of these loans.

Three Sisters and Bedford continued to regularly pay $3,645.83 and $2,500 respectively until October of 1987, when the monthly payments were suddenly reduced to $1,000 and $500 respectively. Spencer's rent receipts do not reflect that any other tenants received any reductions in rent at that or any other time for that matter. Nor did Respondents adduce any evidence to explain the substantial rent reductions in October of 1987 for these companies.

These reduced payments continued through at least January of 1989. In February of 1989, neither Bedford nor Three Sisters paid any rent. The check ledgers of Three Sisters show that it continued to pay $1,000 a month to Spencer at least through July of 1990. However, on its check stubs, Three Sisters labeled its payments to Spencer during the months of May, June, July and August of 1987 as LIE [loans and exchanges] or simply loan, instead of as rent.

Finally, the record reflects that in response to the General Counsel's subpoena for records of Spencer Realty Co., Respondent produced files that included documents relating to Bedford, Three Sisters, United and Skylight, along with documents relating to Spencer. No explanation was adduced by Respondents to explain this commingling of files.

B. ANALYSIS

In determining whether separate entities constitute a single employer, the Board considers factors such as interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. *Hydrolines, Inc.* 305 NLRB No. 40 Slip op. p. 5 (1991). Also relevant are such factors as the use of common office facilities, common use of equipment, and family connections between or among the various enterprises. *Goodman Investment* Co. 292 NLRB 340, 347 (1989). Not all of these factors must be found to establish the existence of a single employer, and no one factor is controlling. Single employer status depends on all the circumstances of a particular case, and is characterized

by an absence of an arms_length relationship found among unintegrated companies. *Hydroline supra; Goodman supra; NLRB v Al Bryant 711 F2d. 543, 55 (3d Cir. 1983).*

The question of whether companies constitute alter egos of each other, involve the examination of similar criteria, plus an examination of the purpose of the formation of the additional companies. Thus, among the factors to be considered are common management, ownership, common business purpose, then assure operations, and supervision, common customers, i.e. whether the employers constitute "the same business in the same market", as well as the nature and extent of the negotiations and formalities surrounding the transaction; and whether the purpose behind the creation of the alleged *alter ego* was legitimate or whether instead its purpose was to evade responsibilities under the Act. *Vinisa II Ltd.*, 308 NLRB No. 28 ALJD Slip op. p. 5 (1992); F*ugazy Continental Corp.* 265 NLRB 130 (1982), enfd. 725 7.2d 1416 (D.C. Cir. 1984).

Although the complaint herein does not allege Southland-Metro to be a Respondent, as noted the alleged connection between the Respondents and Southland-Metro was litigated extensively as bearing upon the issue of how and why the Respondents came to operate at 144 Spencer Street. It is therefore appropriate to decide whether the Respondents do constitute alter egos of the Southland-Metro entity, in assessing whether Respondents are single employers and/or alter egos of each other, as well as in considering the extraordinary remedies requested by Charging Party.

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As noted above, Southland-Metro was found in the prior trial to have violated Section 8(a)(1) and (3) of the Act, including the unlawful termination of 83 employees.[14] In May of 1983, Southland-Metro executed a Stipulation, wherein it withdrew its challenge to Court enforcement of the Board Order. Clearly, Southland-Metro and its principals, the Jacobowitz family knew that the entity was facing a substantial backpay liability to 83 employees as a result of its agreement not to contest the Board Order.

Some four months later in mid September, Southland-Metro purportedly shut down its operation at 144 Spencer Street. However, two weeks later, I conclude that Southland-Metro, reopened its operation after acquiring Three Sisters, and forming the other corporations and continued their business of manufacturing and selling sweaters. Thus, a majority of Three Sisters' employees on October 2 consisted of former Southland-Metro employees, who were assigned to work by Beirel for Three Sisters on the 5th floor at 144 Spencer Street to operate the same sewing machines that they had used two weeks before, while working for Southland-Metro on the 6th floor.

As of October 2, 1983, these employees continued to be supervised by Beirel Jacobowitz. The cutters continued to be supervised by David Jacobowitz. Although the Mandels were the initial owners of Three Sisters, they received a salary for only one year, and disappeared from

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[14] Although only one of the Three Metropolitan entities (Industries) was referred to in the prior decision, I have found above that the single employer enterprise also included Metro Sweater and Metro Form, and the enterprise treated these companies interchangeably. Indeed, the employees at times were paid by Metro Sweater.

any active role in management of the Company after four months. Eventually, Martin Weingarten, a son in law of Jack Jacobowitz and brother-in-law of Beirel and David became the owner of Three Sisters, although it does not appear that he plays any active role in the day to day operations of the business. I find these events to be nothing more than an obvious attempt to insulate Three Sisters from liability for Southland-Metro's unfair labor practices, while attempting to conceal the true facts, that Three Sisters and the other corporations are simply a continuation of the Southland-Metro business operations.

Respondents' attempt to portray Three Sisters as a separate independent corporation that happened to give jobs to Beirel and David is belied by the record. I note particularly that shortly after commencing its operations, Three Sisters gave check signing authority to Beirel, through his alias Abraham Jacobowitz. This not only demonstrates significant evidence of control of Three Sisters at that time by the Jacobowitz's, but is revealing as further evidencing its intent to conceal the Company's connections with Southland-Metro. Thus, no explanation was given as to why Beirel could not have been given check signing authority in his own name, rather than having him sign his brother's name, who was off studying at Yeshiva. I find the only logical assumption to be that since Beirel had been associated with Southland-Metro, it would not be advisable to have his name on record as a check signer of Three Sisters, which might reveal the fact that Beirel was continuing to run the business, as he had done while Southland-Metro was employing the employees.

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It is noteworthy that Respondents have given no credible explanation for their decision to shut down their operation in September of 1983, and reopen two weeks later. Respondents did not present any witness on their behalf. While at one point Jack Jacobowitz, who testified in connection with subpoenaed documents, and as a 611(c) witness, testified that Southland-Metro shut down, "because it had no business", this assertion was not proved by any documentary evidence, and was in fact refuted by the subsequent events of the reopening and the continuation of operations. Jacobowitz attempted to explain this decision by pointing out that as a "jobber", his assertion as to United's function, he had no rent or overhead, and therefore his business was now substantially different. However, as detailed above and below, it is clear that United became more than a mere "jobber", but was in fact the coordinating arm of the business, using Three Sisters to sew and Bedford to cut, and then using Skylight to sell the product to customers. Thus, it is obvious that the entity continues to have overhead and rent expenses, and Jacobowitz's assertion of no business as a reason for the purported shutdown is specious.

Also highly significant is Jack Jacobowitz's admission concerning the hiring of his son Beirel as an "employee" of Three Sisters. I note again my assessment of Jacobowitz's credibility as detailed above, wherein I concluded that he was falsely asserting that he did not remember in responses to may questions, which were in my view an attempt to conceal true facts concerning the relationship between the various companies. Therefore, his admission that *he* (emphasis supplied) gave Beirel a job with Three Sisters,

because Beirel was "entitled to make a living", becomes even more significant in establishing that in fact the Jacobowitz family was in full control of the operations of Three Sisters as of October 2, 1983, when the former Southland Metro employees began their employment with that company.

Another significant factor, frequently relied upon by the Board in finding alter ego status, is the presence of unlawful threats to close the plant by the Company which purportedly went out of business.[15] Here, the prior case did find a number of threats by Jack, David and Beirel Jacobowitz to close the plant if the employees supported the ILG, which is further demonstrative of my conclusion, that Southland-Metro carried out its threat to close,[16] but then reopened again under the new corporate names, in order to avoid their responsibilities under the Act.

Accordingly, based on the foregoing evidence, including the admissions and statements of its officials, the timing and manner and short duration of the alleged shut down *Southeastern Envelope Co.* 246 NLRB 423, 427 (1979), and the absence of any bona-fide reasons for these actions, *BMD supra* fn. 1, I conclude that Southland-Metro, was motivated by the desire to avoid their back-pay liability under the prior Board order, and that Three Sisters and the

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[15] *Fugazy supra* at 1303; *BMD Sportswear Co.* 283 NLRB 142, 155 (1987), *Vulcan Trailer Mfg.* 283 NLRB 4809, 486 (1987).

[16] Even more revealing is Beirel's statement to an employee that Southland Metro had many other places where it could send the work, if it closed. See *BMD supra* fn. 1 at 142.

other entities are an alter-ego of Southland-Metro.[17] *Fugazy supra*; *Vinisa supra; BMD supra; Imco-International* 304 NLRB No. 94 Slip op p. 8 (1991.)

Turning to the various factors considered by the Board in determining single employer and/or alter-ego status, I find that most of them are present in varying degrees with respect to the companies in question.

As for interrelation of operations, the evidence is overwhelming that Three Sisters, Bedford, United and Skylight are all involved in an integrated process of producing and selling garments. Thus, the unrefuted testimony of Galarza as outlined above, traces the flow of the product from the receipt and storage of the fabric, cutting, sewing, packing, shipping and sale of the garment, among the three floors at 144 Spencer Street inhabited by these companies.

All four of these corporations share the same office area, clerical staff and accounting services. *Goodman* supra at 347; *Imco supra* Slip op. p. 6-7.

Three Sisters and Bedford sell almost 100% of their services to United and Skylight. United sells 100% of its services to Skylight. Bedford does all of United's cutting. *Hydrolines supra* Slip op. p. 6.

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[17] I shall detail below more specific findings with respect to the single employer status of these corporations, which also deal with similar criteria *visa a vis* the alter-ego questions.

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United coordinates the production by making purchases on behalf of Bedford, Three Sisters and Skylight, paying for accounting services for these companies, and paying for various joint insurance policies which cover all of these entities. Additionally, at times, United has paid rent on behalf of Three Sisters.

Moreover, Beirel Jacobowitz admitted to employee Galarza that Three Sisters and United were the "same thing:, as well as the fact that Metropolitan Industries was "another of the names that the company had." *NLRB v. Edwin R. O'Neill* 140 LRRM 2557, 2563 (9th Cir. 1992). In this connection, it is also noteworthy that David Jacobowitz signed an insurance document stating that Bedford, Three Sisters and United "are interrelated, located on the same premises and have the same officers", and that the accountant for all of these corporations designated United and Skylight as affiliates, to designate related party transactions under IRS rules.

Additionally, United and Skylight use the same computer, and have been invoiced interchangeably by various vendors. It was required by creditors of United and Skylight to execute cross-corporate guarantees before loaning funds to these companies, which requirements have been complied with by these corporations.

So, in sum, these companies all serve the Jacobowitz family business of producing and selling garments. *Imco supra* Slip op. p. 8. They manufacture the product in an integrated fashion, with United, Bedford and Three Sisters as the manufacturing and production arm and Skylight as

the selling arm of the family business. See *Palby Lingerie* 252 NLRB 176, 178 (1988).

Common management and ownership is clear, and is distributed among various members of the Jacobowitz family, including two Sons-in-laws. Indeed, Respondent concedes in its brief that all the companies are "owned by the Jacobowitz family".

Although the ownership and management of each Company may not be identical, where they all include members of the same family, the requirement of common ownership and management is met. *Vinisa* supra ALJD p. 6 *Crawford Door Sales* Co. 226 NLRB 1144 (1976).

Respondents argue most strenuously that no evidence was presented that any of the companies are involved in a common labor relations policy, and that the absence of such a finding is fatal to a single employer or alter ego determination. In this connection, Respondent correctly notes that United and Skylight have no unit employees.

However, although the Board has frequently stressed the importance of centralized control of labor relations in determining single employer status, *Hydrolines supra* Slip op. 5, this factor becomes less important where some of the companies have no employees. *Imco supra* Sip op. p.8; see also *Goodman supra.* Here there is evidence of centralized control over labor relations of the employees of Three Sisters and Bedford, when Bedford had employees. Thus, communications are made by Beirel and David Jacobowitz

to employees and supervisors by loudspeaker and walkie talkie from the centralized fifth floor office to the other two floors and to travels through the 4th, 5th and 6th floor giving orders and directions to employees employed by both of the corporations working on any of those floors. Moreover, the employees of Bedford and Three Sisters were covered (when Bedford had employees), by the identical collective bargaining agreement with Local 17-18. Of course, currently and approximately since 1989, Bedford has no employees, and all the employees are now on the Three Sisters payroll, and obviously share a common labor policy. Thus, as to Bedford and Three Sisters, the common labor relations criteria is satisfied. Because all the other pertinent single employer criteria are met with respect to Skylight and United, and because there is no arms length relationship among them, a single employer finding is warranted. *Imco Supra* Slip op. p.8, *BMD supra Hydrolines supra.* I so find.

I would also conclude that an alter ego finding as between these companies is also appropriate, since the criteria in *Fugazy supra* has been met. There is common management and ownership, common business purpose, common operation, premises and supervision, and common customers, i.e. the employers constitute the same business in the same market. Moreover, I have concluded the purpose behind these entities operating at 144 Spencer Street was to avoid the backpay obligations of Southland-Metro. Thus, I conclude that United, Skylight, Bedford and Three Sisters are single employers and alter egos of each other, as well as alter egos of Southland-Metro *Imco supra BMD supra.*

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The complaint also alleges that Metro-Sweater is part of the single integrated enterprise and should be found to be a Respondent in the instant case. General Counsel argues that since Metro-Sweater maintained a bank account until 1987, and its form were used by United to purchase goods until 1985, and there is no evidence that the Company is defunct, Metro-South must be considered to be a part of the single integrated enterprise.

However, I need not decide the question of whether Metro-Sweater is defunct, or is still in existence. Inasmuch as I have already concluded that Metro Sweater was part of the Southland Metro integrated enterprise, and that the current United, Three Sisters, Bedford, and Skylight integrated enterprise is an alter ego of the Southland-Metro entity, it is appropriate to include Metro-Sweater as a Respondent herein and as part of the single employer responsible for the unfair labor practices that I find below. I note particularly in this regard, that the Order in the prior case did not include Metro-Sweater, so it is essential to include that entity as a Respondent in the event the Jacobowitz family decides to resurrect that Company and operates under that name once again.

Turning to 144 Spencer Street Realty Corp. (Spencer), the complaint, as amended, alleges and General Counsel contends that a single employer relationship also exists between Spencer and the other entities involved. Respondent urges that since Spencer is involved in real estate ownership and management, a business "totally and completely" removed from that of the other companies, a single employer relationship cannot be found. I do not

agree. Notwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found particularly where there is evidence of a lack of an arms length relationship between the entities. *G. Zaffino & Sons, Inc.* 289 NLRB 571, 577 (1988), *Fullerton Transfer & Storage, Inc.*, 291 NLRB 426 (1988), *Capitol Theatre* 231 NLRB 1370, 1374-5 (1977). Here, the evidence supporting the lack of an armed length's relationship between the parties is substantial.

Spencer shares office space, clerical employees and accounting services with the other companies. *Capital supra* at 1375. Spencer had the identical taxpayer ID number as Metro-Sweater. *Precision Carpet, Inc.* 223 NLRB 329, 338 (1976). Spencer is managed and owned by various members of the Jacobowitz family, as is the other corporate entities. *Zaffino supra; Fullerton supra.* Most importantly, Spencer never obtained any leases from any of the Jacobowitz dominated companies, while requiring leases from other tenants in the building. Additionally, United and Skylight paid no rent to Spencer, except for the times when United paid rent on behalf of Three Sisters. Also, there were several months when Three Sisters and Bedford never paid rent, and these delinquencies were never satisfied. United made loans of over $20,500 to Spencer which were not repaid. Most significant of all is the sudden unexplained reductions in rent for Bedford and Three Sisters in October of 1987 of 80 and 74% respectively. *Zaffino supra. Fullerton supra.* Finally, the record reveals the commingling of records in the files of Spencer with those of the other companies.

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Based on the foregoing, I conclude that there is ample evidence in the record to support the conclusion that the dealings between Spencer and the other companies cannot be characterized as being at arms length. *Zaffino supra.* Accordingly, I find that Spencer, is also part of the single integrated enterprise with and is an alter ego of the other corporations described above. *Zaffino supra; Fullerton supra; Capitol supra.*

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND

As noted above, the prior case revealed extensive animus towards the employees because of their efforts to support the ILG. Employee Francisca Aguilar was one of the discrimiinatees in the prior case. Her sister Auzencia Lugo, as detailed above, worked for Southland Metro and then at Three Sisters. In 1985, Lugo asked Beirel if she would rehire her sister, Francisca Aguilar. Beirel informed Lugo to bring her sister, but to tell her "not to cause any problems."

When Aguilar went to Respondents' facility, she spoke to Beirel about a job. Beirel told her that he didn't want any more problems and warned her not to get in trouble with the Union. He added that there was already a good union in and he didn't want her to look for another union. Beirel continued that Local 17-18 is the Union in, and is a good union and is the union that he wanted.

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About three weeks after she was rehired, Beirel asked her to distribute some flyers for Local 17-18 during work time. Beirel also gave her $50 to distribute the flyers and $100 to tell employees that Local 17-18 was a good union and the employees would always have jobs, and that the other union, the ILG was also bringing problems.

B. SUPERVISORY OR AGENCY STATUS

As noted above, Beirel and David Jacobowitz are the chief operating officials of the Respondents, who hire and fire and make most managerial decisions. There can be little dispute that they are supervisors and agents of Respondents and I so find.

Pablo _____ is the plant manager who reports directly to Beirel and David. He oversees the operation of 130-150 employees, consisting of three sections of merrow machine operators, and one, section of singer machine operators. Pablo responsibly distributes the work to section supervisors who in turn assign work directly to the employees. Pablo also instructs the section supervisors to move employees from one job to another and occasionally will make such assignment himself. He also makes sure the Respondents' work rules are complied with, makes announcements over the loudspeaker on behalf of Respondents, and has the authority to grant time off to employees. Based on the foregoing, I find that Pablo is supervisor under Section 2(11) of the Act, *BMD Sportswear* Ltd. 283 NLRB 142, 146-147 (1987), or at the very least has been placed in a position _____ Respondents, that

employees consider him to be their agent. *Community Cas___Stores* 238NLRB (1978).

Gary is in charge of supervising 125 floor workers. He has signed disciplinary warnings, and fired employee Rosita Chalston. He is clearly a supervisor and agent of Respondents and I so find.

A more difficult question arises with respect to the section supervisors, Vicky, Faith a/k/a/ Faye, Lipo Diamond and Sarah Stern.[18] These individuals have the title of supervisor and are in charge of the direct assignment of work to from 20-35 employees in the various sections of Respondents' facility operating either the merrow or the singer sewing machines. These individuals also review the quality of the work performed by these employees, and can require the work to be redone if necessary. The record also establishes that Vicky evaluated and hired employee Silvia Silverio without consultation with any other management official.

Since the possession of any one of the functions enumerated in Section 2(11) of the Act is sufficient to establish 2(11) status, I conclude that Vicky's authority to hire employees on behalf of Respondents with the exercise of independent judgment, warrants a finding that she is a supervisor under the Act and an agent of Respondents *Top Job Building Maintenance Co.* 304 NLRB No. 117 ALJD Slip p. 2-4 (1991).

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[18] Stern is also the aunt of Beirel's wife.

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However, as to Sarah Stern, Faye and Lipo Diamond, the fact that they are designated as supervisors is not sufficient to establish their supervisory status, *Top Job supra ALJD* Slip op. p. 3, nor is the fact that employees may consider them to be supervisors. *Blue Star Ready-Mix Concrete Co.* 305 NLRB No. 43 Slip op. p. 4 (1991). Although the evidence discloses that these individuals do assign work to employees, check the work of employees and on occasion order such employees to redo work, these functions alone are not sufficient to establish supervisory status, since it is essential to establish that the "supervisors" exercised independent judgment in the exercise of these functions. *Clark Machine Corp.* 308 NLRB No. 80 Slip. op. 1-3 (1992); *Top Job supra* ALJD Slip 3-4; *Blue Star supra* Slip op. p. 3-5; Cobra Gunskin 267 NLRB 264, 267 (1983). Accordingly, I conclude that General Counsel has not established that Sarah Stern, Lipo Diamond or Faye exercise independent judgment, or that they are supervisors under Section 2(11) of the Act.

However, that is not the end of the inquiry, since even absent supervisory status, an employer can be responsible for the conduct of an employee as an agent, in particular situations, where under all the circumstances, the employees would reasonably believe that the employee was reflecting company policy and acting on behalf of management. *United Cloth Co.* 278 NLRB 583, 586 (1986). *EDP Medical Computer Systems, Inc.* 284 NLRB 1232, 1265 (1987); *Wm. Chalson & Co.* 252 NLRB 25, 33-34 (1980); *Community Cash supra.*

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Here the activities of Sara Stern and Lipo Diamond which are alleged to be violative of the act, involve their actions in supervising, and correcting the work of Galarza and Nieves. In these circumstances, it is clear that the Respondents have place Stern and Diamond in positions where the employees clearly had a reasonable belief that Stern and Diamond were acting on behalf of management, at least in connection with their supervision and correction of the work of the employees. Thus, Stern[19] and Diamond were acting as agents of Respondents in these particular areas. *Albertson's Inc.* 267 NLRB 534, 1983; *Quality Drywall Corp.* 254 NLRB 617, 620 (1987).

I shall leave the discussion of the agency status of Faye as well as employee Maria Reina to the evaluation of the specific unfair labor practices attributed to their conduct.

C. ALLEGED 8(a)(1) and (2) and 8(b)(1)(A) CONDUCT

The ILG began their most recent organizing campaign in December of 1988. The ILG representatives would stand outside the plant distributing leaflets to employees as they entered and left. In late December of 1988, an ILG leaflet had been hung from the light string near the lunch table where a number of employees including employee Bella Martinez were having lunch. Beirel walked by and read the ILG leaflet. He then turned around and

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[19] I would also note that Stern is an aunt of Beirel's wife, which is an additional factor supporting reasonable belief of employees that she was acting on behalf of management. *United Cloth supra* at 586.

said to the employees, "don't take those papers -- that's the mafia". This comment is virtually identical to the statements made by representatives of Respondents in the *Southland-Metro* case, which were found violative of Section 8(a)(1) of the Act therein. 260 NLRB at 650, 655. Accordingly, I find Beirel's remarks herein also to be violative of Section 8(a)(1) of the Act. Similarly, in March and April of 1989, Beirel on three occasions instructed employee Carmen Nieves not to take ILG literature or if they take it, to rip it up, or not to pay attention to the ILG papers. These remarks are also violative of Section 8(a)(1) of the Act and I so find.

In April of 1989, Beirel approached Francisca Aguilar in the plant. He asked her to help him give out leaflets for his Union, (Local 17-18), because the people from the ILG were there. Beirel added that she should tell the other employees that his union was good and that they were going to have a lot of worl. Beiral also told Aguilar that he was going to pay her for helping him, as he had the time before. [20] Aguilar replied that she was not accepting his offer. Beirel responded, "you support the other Union. You support the International. I am not going to trust you anymore." I find that Beirel's offer to Aguilar to pay her to assist him in telling employees that in effect support for Local 17-18 would result in a lot of work for the employees, constitutes unlawful promises of benefit to employees in violation of Section 8(a)(1) of the Act, as well as unlawful assistance to Local 17-18 in violation of Section 8(a)(1) and

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[20] As detailed above, Aguilar accepted $150 from Beirel in 1985 for performing such services for Beirel.

(2) of the Act. I also conclude that Beirel's statement to Aguilar that he was not "going to trust her anymore" because she would not assist him in his attempts to induce employees to support Local 17-18, is a further violation of Section 8(a)(1) and (2) of the Act. *Metropolitan Life Insurance* Co. 256, NLRB 626, 633 (1981) and cases cited therein.

In April of 1989, Beirel told employees that if the ILG came in, he would have no problems, he would close the factory. On approximately 10 occasions during 1989 and 1990, Lugo heard Beirel tell employees at the factory that he didn't want the ILG and that he would rather close the factory down before the Union gets in. These statements are clear violations of Section 8(a)(1) of the Act. I so find.

Similarly, in the course of his discharge of employee Bella Martinez to be discussed *infra*, Beirel mentioned "everyone outside", which I concluded referred to the ILG organizers then passing out leaflets, and stated that he was going to fire everyone and close down. I find this statement to be an unlawful threat of discharge, as well as a threat to close down, because of the organizing actions of the ILG, in violation of Section 8(a)(1) of the Act.

Additionally, on or about November 27, Vicky, whom I found above to be a supervisor and agent, told employees that Beirel was going to shut down the factory because of the other union that wants to get in. I find this statement also to be violative of Section 8(a)(1) of the Act.

This finding is based upon the affidavit of Aura Funez, which General Counsel introduced into evidence

through the credible testimony of the NLRB representatives, as well as Funez's admission that her signature appeared on the documents. While at the trial, Funez testified that she did not even recall giving the statement, or recall any of the events included therein, I do not credit her testimony in this regard, and find that her professed lack of memory was simply a ruse to refuse to answer questions. *New Life Bakery, Inc.* 301 NLRB No. 66 ALJD Slip op. p. 10 (1991). I conclude that Funez who was still employed by Respondents, was so frightened about testifying against Respondents, particularly in view of the extensive unfair labor practices committeed by Respondents, that she chose to simply claim that she did not remember anything in her statement.[21]

Based upon the above, I conclude that it is appropriate to consider the affidavit of Funez as substantive evidence, as a past recollection recorded under Section 803(5) of the Federal Rules. *New Life Bakery supra* ALJD Slip op. p.9-11. See also *Snider Syrup Corp.* 220 NLRB 238, fn. 1(19) *Starlite Mfg. Co.* 172 NLRB 68, 72 (1968) where such an affidavit was accepted as substantive evidence even apart from Section 803 of the Federal Rules.

According to the affidavit of Funez, sometime in November, Maria Reina, an employee from the blind stitch section came to her machine during working hours, circulating a petition indicating that the employees do not want to belong to the ILG. The affidavit adds that Reina

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[21] I note that it was necessary to enforce the subpoena against her in Federal Court, and have her brought to the trial by the Marshall.

told her that the petition should be signed by those who want to keep their jobs, because Local 17-18 was the union the employees needed to keep.

Reina was also one of the shop stewards for Local 17-18, and the record reveals that Respondents permitted her to make announcements on behalf of Local 17-18 over Respondents public address system to the employees. General Counsel argues that Respondents' action in permitting Reina to use their public address system, makes her an agent of Respondents. I do not agree.

The test for agency as noted above, is whether in all the circumstances the employees would reasonably believe that the employee was speaking for management. In my view, that test is not met, by the mere fact that Reina was allowed to make announcements on behalf of Local 17-18 over the public address system. It seems that employees are just as likely to believe that Reina was speaking on behalf of Local 17-18 when making these announcements particularly in view of her position as shop steward for that union. Therefore, I conclude that the permission to Reina to use Respondents' public address system is not sufficient in itself to make her an agent for Respondents, and General Counsel has not established any other probative evidence,[22] that might make Reina an agent for Respondents with respect to this incident. Thus, I do not find Respondents to be responsible for Reina's conduct in either circulating the

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[22] While Funez' affidavit reflects that Beirel and supervisor Faye "were in the area" while Reina circulated the petition, this statement is not sufficiently precise to establish that Beirel actually observed or was aware of Reina's actions in this regard.

petition or threatening loss of jobs. Therefore, these allegations must be dismissed.

Funez' affidavit also described an incident that occurred on December 7, 1989. At that time, Funez, (who was also one of Local 17-18's shop stewards) was called into a meeting at Respondents premises by Javier Jara, a representative of Local 17-18. Also present were another Local 17-18 representative, and four other shop stewards, including Reina and Arlene _____. Faye came into the office and asserted that there was a problem in the factory, and that she had circulated a petition amongst the employees, because if the other Union (ILG) got in, she wanted to protect her job, because Beirel was going to close the factory. One of the Local 17-18 representatives said they knew of two or three people who signed for the "other union", but he did not know all the names.

Faye replied that she could try to find out who signed for the other Union, and suggested that Local 17-18 "people"[23] do the same. Faye handed the petitions that she and Maria Reina had circulated to the Local 17-18 representatives, who replied that they needed help and that the petitions were important.

General Counsel argues that during this meeting Respondents by Faye violated Section 8(a)(1) of the Act by threatening plant closure, and Sections 8(a)(1) and (2) by offering to engage in surveillance of employees on behalf of

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[23] By reference to 17-18 "people", the affidavit does not make clear whether that refers to the representatives or the employees who as noted were all shop stewards.

Local 17-18, and by soliciting on behalf of Local 17-18 a petition amongst employees, and turning the petition over to Local 17-18 representatives. However, since I have found above that General Counsel had not established that Faye was a supervisor of Respondents under Section 2(11) of the Act, and General Counsel has not argued, nor does the record support, an inference that she can be otherwise be found to be an agent of Respondents, I cannot find Respondents responsible for her conduct. Accordingly, I am constrained to dismiss these allegations of the complaint.

This incident also forms the basis for the complaint allegations against Local 17-18, which alleges in substance that Local 17-18 by accepting Respondents' offer to engage in surveillance of Respondents' employees to learn the identity of ILG supporters and disclose said information to Local 17-18, has created the impression among the employees of Respondents that their activities on behalf of the ILG were being kept under surveillance.

Since I have dismissed the complaint allegations against Respondents concerning the events of this meeting, because General Counsel has not established the agency status of Faye, it follows that the allegations against Local 17-18 must be similarly dismissed. It is also noteworthy that all of the employees present at this meeting were Local 17-18 shop stewards, so that the discussions about ascertaining the identity of Local ILG adherents was solely among agents of Local 17-18, without any non-agent employees of Local 17-18 ever being aware of the discussion.

I also would note that all the evidence with respect to this issue came from Funez' affidavit, even though General Counsel could have adduced such evidence from other witnesses who were present. I would be reluctant to find a violation against Local 17-18 solely on the basis of the affidavit. Although, as noted there is precedent for the reliance on such evidence, it is questionable whether a violation should be found based on such an affidavit by itself, where other probative evidence was possible. *New Life Bakery supra* ALJD slip op. 17.

Finally, I would also observe that Local 17-18 despite its conflict with the ILG, vigorously pursued the grievances of known ILG supporters, Nieves, Chalston, and Martinez and successfully obtained their reinstatement through arbitration. In such circumstances, it is questionable whether the purposes of the Act would be effectuated by the issuance of an Order against Local 17-18 for a single instance and a relatively minor violation of creating the impression of surveillance.

In April of 1989, Beirel approached Nieves at work and asked her whether she had signed anything for the ILG. Nieves replied no, although she in fact had signed a card. At around the same time, Beirel used Nieves to translate for him in talking with employees Angela Caravallo and Maria Rivera. Beirel, through Nieves asked the employees if they had been visited at home by representatives of the ILG. The employees replied that they had been visited by no one. Beirel added that if the ILG came in, he would have no problems, because he would close the factory.

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At around the same period of time, Beirel called employee Gloria Soto into his office and asked her what the ILG offered and whether she had signed for the ILG. Soto denied signing a card, but added that she liked their benefits.

I find that all of these instances of questioning by Beirel constitute coercive interrogations under the standards of *Rossmore House* 269 NLRB 1176, 1177, (1984), and that by such conduct, Respondents have violated Section 8(a)(1) of the Act. *BMD supra* at 156, *EDP supra* at 1264-5.

Soto also testified that on one or two occasions in March or April, she observed Beirel standing outside the factory door looking at the ILG representatives handing out leaflets to employees as they were leaving work. She further testified that Beirel was standing about eight feet away from the leafletters, but did not testify for how long a period of time she noticed him observing. Soto also testified that Beirel does not usually stand at the door when employees leave work.

General Counsel alleges that since it was not normal practice for Beirel to stand outside the factory door and observe employees as they leave, that his conduct herein constitutes unlawful surveillance.

However, it is well settled that where, as here, Union activity is conducted openly at or near company premises, open observation of such activities by an employer is not unlawful. *Roadway Package Systems, Inc.* 302 NLRB #159

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Slip op. p.2 (1991); *Mademoiselle Knitwear, Inc.* 297 NLRB 272, 278 (1989); *EDP supra* at 1265-6.

While in some situations, conduct well "out of the ordinary" has been deemed sufficient to transform casual observation to unlawful conduct, *Eddylean Chocolate Co., Inc.* 301 NLRB No. 125 Slip op. p.4-6(1991); *Impact Industries, Inc.* 285 NLRB 5 fn. 2(1987), the mere fact that Beirel usually does not stand outside the door, when employees leave, is not sufficient, particularly in view of lack of evidence of "continuous scrutiny" *Impact supra* of union activity, to establish a violation of the Act.

I shall therefore recommend dismissal of this allegation of the complaint.

As will be more fully detailed below, on several occasions between October 1990 and February 1991, Beirel issued instructions to Respondents' mechanic Israel Galarza not to speak with employee Carmen Nieves because she was trying to bring in or was a supporter of the ILG. On one occasion, Beirel accompanied this admonition with a threat to close the factory, and on another with a threat that if Galarza did not comply with the order, "he would be damaged". Additionally, on another occasion, Beirel ordered Galarza not to fix Nieves' machine, unless Pablo approved, which was contrary to past practice, and contrary to the practice concerning other employees, where machines are fixed at the direct request of the employee themselves.

I find all of these actions by Beirel, i.e. the admonishment not to talk to Nieves, the threat to close, the

threat that Galarza would be "damaged" if he did not comply with Respondents' order not to talk to Nieves, and the order not to fix her machine unless Pablo approved, to be violative of Section 8(a)(1) of the Act. Additionally, the order with respect to changing practices with regard to fixing Nieves' machine is also violative of Section 8(a)(3) of the Act, as it is a change in terms and conditions of employment.

During the February 9, 1991 discussions between Beirel and Galarza about this subject, Beirel told him that he knew that Galarza was still speaking with Nieves, and that he knew that Nieves would drive Galarza to the train. Beirel again forbid Galarza from talking with Nieves because she was a "bad woman", and she wanted to get the "union" in. Galarza responded that it seemed that Beirel had a person who was telling him everything that Galarza did. Beirel did not respond.

General Counsel contends and I agree that Beirel's comments to Galarza that he knew that Galarza was still talking to Nieves and in fact was driving with her to the train, constitutes an unlawful creation of the impression of surveillance of employees' union activity.

While there is no evidence that Galarza himself engaged in any Union activities, it is clear as detailed above and below that Nieves was a leading adherent for the ILG and that Respondents had unlawfully issued instructions to employees, including Galarza not to speak with her, because of her union activities. Therefore, it is also clear that Respondents believed that Galarza was engaged or would be likely to engage in activities on behalf of the ILG, if and

when he spoke with Nieves. In these circumstances, I conclude that Beirel's remarks had the reasonable effect of creating the impression that Respondents were keeping under surveillance the known or suspected union activities of Nieves and Galarza, and is violative of Section 8(a)(1) of the Act. *Escada U.S.A. INC. 304* NLRB No. 109 ALJD Slip op. p. 6-7 (1991); *Local 302 Engineers* 299 NLRB 245 (1990); *Great Dave Trailers 293 NLRB 384, 385* (1989).

D. ALLEGED DISCRIMINATION AGAINST CARMENT NIEVES

Carment Nieves began her employment with Three Sisters in September of 1987 as a merrow machine operator. She was hired by Beirel and worked as a piece worker most of the time, with an occasional assignment as an hourly paid worker from Pablo.

In December of 1988, Nieves attended an ILG organizing meeting at the home of another employee. Nieves signed a card at that time, and assisted other employees in filling out their cards. Nieves attended another union meeting in January of 1989, wherein she was given authorization cards to distribute to employees. Thereafter, Nieves distributed and obtained six cards from employees during lunch hour in the bathroom.

In March of 1989, the ILG organizers were distributing leaflets to Respondents' employees outside the plant. At about 5:00 p.m., as Nieves was preparing to leave, Beirel approached her and another merrow machine

operation. Beirel told them that the ILG representatives were handing out literature downstairs, and instructed the employees not to take it or if they took it to rip it up. Beirel also asked Nieves to stay with him and transmit this message to other employees in Spanish for him. Nieves refused telling Beirel that she was going home. On two other subsequent occasions in late March or early April, Beirel again instructed Nieves not to pay any attention to the ILG papers and not to take them.

As noted above, I have found that Respondents violated Section 8(a)(1) of the Act by this conduct as well as by interrogating Nieves and other employees about whether ILG representatives have visited their home, or signed cards and by threatening Nieves and other employees with shutdown of the plant if the ILG were to come into the factory. Beirel also utilized the services of Nieves to translate to other employees the threat to close the factory.

In May of 1989, Nieves was working on a blind stitch sewing machine, along with seven other of her coworkers. Because of the difficulty of making the sleeve on that machine, Nieves after discussing the matter with her fellow employees, asked Beirel on behalf of all the eight employees for more money for this work. Beirel agreed to give the employees extra money, but when they received their paychecks the next week, the employees believed that the money that they received was insufficient. The employees then decided to speak to Beirel, with Nieves as spokesperson. The employees went as a group to speak to Beirel, and Nieves told him that he had not kept his word, and the amount of money paid was too little for the kind of

work being performed. Beirel responded that he could not pay any more, and if anyone was not in agreement, they could work on the merrow machines.

The next working day, the employees came to work in a group and asked for their merrow machines. Beirel attempted to convince them to work on the blind stitch machine, but Nieves insisted that the employees would not do so without an agreement for higher wages. Beirel said he would think about it next week. Nieves replied that the employees cannot wait until next week. Finally, after initially agreeing to allow them to work on the merrow machine, Beirel changed his mind and told the employees including Nieves to go home, that he had no work for them. The next day, Nieves returned and asked to be returned to work on the blind stitch machine. Beirel refused, telling Nieves that she was a troublemaker, and that she was the one who was instigating the other workers to demand better prices.

Subsequently, Nieves and the other employees spoke to a representative from Local 17-18 about their discharge. Shortly thereafter, Nieves was reinstated by Respondents to her position as a merrow machine operator.

On November 19, 1989, Nieves made an announcement on a Spanish radio station in favor of the ILG. In the announcement, Nieves identified herself by name, indicated that she had signed for the ILG, that Local 17-18 "was not a real union", and that the ILG was a "real union". On November 24, Beirel told Nieves that he had heard her announcement on the radio. Nieves replied that

he (Beirel) doesn't listen to Spanish radio, somebody must have told him. Beirel replied that he had heard it.

Shortly thereafter, in late November, Beirel prohibited Nieves from translating for other employees to him, as she had frequently done in the past. In fact, as noted at times Beirel would use Nieves himself to translate to other employees. On this occasion, Beirel told Nieves that she had no business being an interpreter for other employees, told her to return to work, and added that she (Nieves) was a trouble maker. Beirel continued that she "was causing a lot of trouble in the factory", and that is she wanted to be a lawyer, she should open up an office.

On or about November 21, an employee was talking to Nieves about a work related matter. Beirel approached them and asked the employee (named Maritza) what she was doing talking to Nieves. Maritza replied that she was asking about some sleeves. Beirel instructed Maritza that she was not supposed to talk to Nieves, and if she needed anything, she should talk to Pablo. A few days later, another employee came to Nieves' machine to talk to her about getting paid for Thanksgiving. At that time, David Jacobowitz came over and after asking the employee what she was talking to Nieves about, took the employee into the office for 10-12 minutes. Prior to these incidents, employees would often come to Nieves' machine to talk to her and Respondent's officials never complained about this to Nieves or any other employee. Moreover, other employees also have spoken to their fellow employees about work related or other matters during the course of the work day, without any criticism from management. Moreover, there

is no evidence of the existence of any rule by Respondents against talking to other employees during work.

On or about November 28, at about 5:05 p.m., employee Delfia Cajeho was talking to Nieves about the subject of pay for Thanksgiving. Beirel came over and asked Cajeho what she was talking to Nieves about and added that she was not supposed to talk to Nieves. Cajeho replied that it was after 5:00 p.m. Beirel instructed Cajeho to go to work or go home. Cajeho responded that if he (Beirel) had a problem with Nieves, that was between the two of them, but Nieves was her friend and she would talk to her. Beirel did not respond, and went back to the office.

A few minutes later, Beirel came to Nieves' machine, and told her that he wanted to speak to her in his office because of the argument between Cajeho and Beirel about Cajeho talking to Nieves. Nieves replied that she had been instructed by Pablo to finish a particular bundle. Bierel insisted that she stop work and accompany him into his office, where David Jacobowitz was present. David began by telling her not to scream at him. Nieves shrugged her shoulders and replied that she had not said a word. David then shook his finger at Nieves and said, "You are fired, you are fired, you are fired." Nieves asked why? At that point, David screamed and called her a "son of a bitch", a "whore", and a "mother fucker", and told her, "get out of here, I don't want to see you in this factory any more." Nieves felt a knot in her throat, and asked David what he had said. He repeated what he said, adding "that's exactly what you are, what I said, you are a son of a bitch, you're a shit, you're a whore – get out of my factory." Beirel then began to scream

also, that Nieves was fired, that she should leave and that she was fired. At that point, Nieves began to leave, but Beirel crossed in front of her and blocked her from exiting the office. According to Nieves, she felt it was like a rosary. The Jacobowitz' kept repeating the same things over and over again. They were asking her to leave and yet they wouldn't allow her to leave.

At that point, David opened the door and yelled to Pablo that Nieves was fired and he should not allow her to come to work the next day. David then turned to Nieves and told her to leave the factory right away, or he would call the police and have her handcuffed and removed.

Nieves was not allowed to return to her work station to retrieve her coat and handbag. David instructed Pablo to bring her belongings, at which time Nieves began to cry. She asked why she was being fired. David replied that she knew the reason why.

Subsequent to her discharge, Local 17-18 filed an arbitration on behalf of Nieves, protesting her discharge. A hearing was held, and the arbitrator issued his decision on March 24, 1990 overturning the discharge, on technical grounds, but also crediting Nieves' version of events as to who used profane language.[24] On April 4, 1990, Nieves attempted to return to work accompanied by Local 17-18's business agent Javier Jara. Beirel refused to permit her to

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[24] Nieves also filed for Unemployment Insurance, and after a hearing, the ALJ at the New York State Unemployment Insurance Division also credited Nieves and granted her unemployment benefits in a Decision issued on February 23, 1990.

return to work, notwithstanding the issuance of the arbitrator's decision, and threatened to call the police unless she left the premises.

Finally, after additional efforts on her behalf by Local 17-18, Nieves was reinstated on May 7, 1990. After Nieves' return in May 1990, Funez observed Pablo removing an ILG button from Nieves' handbag. After her return, however, Nieves was not assigned to her old machine or her old section. Instead, she was isolated from other employees, with her back to all the other workers, in an area surrounded by broken or damaged machines which were not being operated. Previously to her discharge, she was assigned to operate a machine which was in the midst of other employees on all sides of her.

When Nieves was hired in 1987, as a merrow machine operator, she had twenty years of sewing experience. Merrow machine operators are paid on a piece work basis.

Prior to her discharge in 1989, each morning, she would receive five bundles of material, which included 36 pieces to sew. Generally, the bundles would all be of the same style and colors. Usually throughout the day, she would receive a total of 10 or 11 bundles, mostly of the same color. Changing colors requires the operator to change the threads on the machine, which causes the operator to spend additional time. She rarely had to change threads three times a day prior to her termination.

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When she returned to work on May 7, 1990, Nieves was assigned more difficult work of sewing collars and sleeves, than she had been receiving prior to the discharge. Additionally, she was given one or two bundles at the start of the workday rather than the five bundles that she had been receiving prior to the discharge, and the five bundles that all of the other machine operators continued to receive at the beginning of the day on and after May 7. Additionally, after Nieves completed her two bundles, she received bundles of different colors which required her to change threads. During the first week after her reinstatement, everyday her assignments required her to change threads two or three times a day.

Prior to the termination when she completed her bundles, she would ask for more work and receive it in one or two minutes. After her reinstatement, it took from seven to eight minutes for her to receive new bundles. Her coworkers, however, continued to receive new bundles quickly. On a few occasions, Nieves attempted to pick up the bundles herself, rather than to wait for them to be brought to her. However, Pablo told her not to do so, and to go back to her machine and wait for someone to bring her some work. Additionally, after the reinstatement, Nieves would frequently receive bundles without threads or without sufficient quantities of labels. After asking for the threads and labels, and not receiving them promptly, Nieves would once again attempt to obtain them herself. However, once more Pablo would tell her that she was not supposed to move from her machine and should wait for someone to bring her the threads. These practices have continued to the date of the hearing. At one point in October of 1990, Nieves

complained to Pablo that she was losing 15-20 minutes a day just waiting for bundles and materials. Pablo replied, "that's nothing, that's nothing for you."

Prior to the termination, Nieves' work was checked by her immediate supervisor once a day in the morning, as Nieves was an experienced seamstress. However, after reinstatement, her immediate supervisor became Sarah Stern, who, as noted, is the aunt of Beirel's wife. Stern would constantly be checking her work, on the average of six or seven times in the morning and about the same number of times in the afternoon. During the first week after her return, Stern checked Nieves' work every twenty minutes. Stern would check each bundle from the first piece to the last. Her prior supervisor, Berta would check only the first piece in each bundle. Frequently, Stern would tell Nieves that the work was not properly done and ordered Nieves to sew it over again although the work was competently done.[25] Berta, her prior supervisor, never instructed Nieves to resew her work prior to her termination.

After her reinstatement, Respondents continued its policy of forbidding employees to talk to Nieves. On May 8, the day after her reinstatement, several employees came to Nieves' machine to either borrow a pen or discuss work related matters. Pablo either personally or over the loudspeaker would tell these other employees to return to their machines. In the personal conversations, Pablo asked the employees what they were doing at Nieves' machine and

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[25] Nieves who worked as a pieceworker, would not be paid any additional money for having to resew the garment.

what they were talking about while ordering them back to their machines. Nieves was the only employee subject to this treatment, as other employees were permitted to talk to fellow workers at their machines, without Pablo or any supervisor telling them to return to their machines.

In October of 1990, Beirel instructed Israel Galarza, Respondent's mechanic not to speak with Nieves because she was trying to introduce the ILG. Later on in October Beirel reiterated the prohibition to Galarza about speaking to Nieves, because she wants to "get the other union in the factory". Beirel added a threat of plant closure if this occurred. In November, Beirel instructed Galarza contrary to past practice, that he should no longer fix Nieves' machine upon her direct request, but that Pablo must approve such action. Beirel added that Nieves "is a very bad woman.....she wanted to hurt him by getting the other union in."

Finally, Respondents continuing animus towards Nieves was displayed even during the course of the instant hearing. Thus, Nieves received a subpoena to appear at the NLRB for the instant hearing on Monday, June 24, 1991. She notified Pablo on Friday, June 21 of this fact and he said "okay, that's fine." However, on Monday, she was not called as a witness and was told to appear on Tuesday, June 25. When she called Pablo on Monday in the afternoon, he asked her why she hadn't been at work. She reminded him that she had informed him on Friday that she had been subpoenaed to appear at the NLRB. Pablo replied that she had been absent too many times, and asked her if she was working for Respondents or the NLRB. Nieves responded

that it was not her fault. Pablo answered,"if you are with them, then you better go and work for them." He added, "When she return, she better talk to Beirel."

Analyzing the termination under the criteria of *Wright Line 251* NLRB 1053 enfd. 662 F2d 899 (1st Cir. 1981) and *Transportation Management Co.* 462 U.S. 305 1983 it is clear that General Counsel has established a strong prima facie case that a motivating factor in Respondent's discharge of Nieves was her activities on behalf of the ILG and other protected conduct. Thus, immediately after Beirel admitted knowledge of Nieves' ILG support, by telling her that he had heard her radio broadcast in favor of the ILG, he called her a troublemaker,[26] refused to allow her to translate for employees as he had in the past, and isolated her from her co-workers by ordering other employees not to talk to her. Four days later, she was terminated. Also Nieves was subject to previous interrogations, threats of plant closure, and unlawful instructions by Beirel not to accept ILG literature. Indeed, Nieves was used by Beirel to translate some of his unlawful instructions and threats to other employees.

Thus, the timing of the discharge, four days after the radio commencement, coupled with the significant animus

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[26] Although the troublemaker remark may also have referred to Nieves' previous activities of being spokesperson on behalf of employees protesting Respondents' wage policies, this conduct of Nieves is also protected concerted activity.

towards the ILG in general and Nieves in particular,[27] as well as her protected conduct involving the pricing dispute, establish that protected activities were motivating factors in Respondent's decision to terminate her.

The burden then shifts to Respondents to establish that they would have taken the same action against her, absent such protected conduct. *Wright Line supra.* Since Respondents have adduced no evidence as to why they discharged her, they have not met that burden.

Moreover, the humiliating manner in which she was discharged, for no apparent reason, and accompanied by a disgraceful exhibition of profanity and physically preventing her from leaving, further reinforces the conclusion that her discharge was violative of Section 8(a)(1) and (3) of the Act. I so find.

I also find that Respondents' verbal abuse of Nieves and their physical prevention of Nieves from leaving, constitutes independent violations of Section 8(a)(1) and (3) of the Act. *Kenrich Petrochemicals* 294 NLRB 519, 534-5 (1989).

Subsequent to her reinstatement, In conclude that Respondents continued their unlawful treatment of Nieves. I note initially Respondents' refusal to initially agree to reinstate her after the arbitration decision, and their threat

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[27] I note also in this regard the statements made to Galarza by Beirel wherein he instructed Galarza not to speak to her or fix her machine on request, because she wanted to hurt Beirel by trying to get the ILG into the factory.

to call the police if she did not leave at that time. This is demonstrative of continued animus towards Nieves, which Respondents further manifested by isolating her from other employees, forbidding other employees from speaking with her, forbidding the mechanic to fix her machine upon her request, subjecting her to closer supervision, and giving her difficult, fewer and slower assignments, which reduced her earning opportunities in view of her piecework status.

I find that all of these actions were also motivated by Nieves' protected conduct, as detailed above. Since once more Respondents have adduced no evidence as to why they took any of these actions, they have not met their burden of proving that they would have acted in the same way absent her protected activities. Therefore, I conclude that Respondents have further violated Section 8(a)(1) and (3) of the Act by these actions against Nieves. *BMD supra* at 160; *Heartland of Lansing Nursing Home* 307 NLRB #25 ALJD Slip op. p. 20-21 (1992).

E. THE ALLEGED DISCRIMINATION AGAINST BELLA MARTINEZ

Bella Martinez was hired by Respondents in 1987 as a merrow machine operator. As noted, in December of 1988, Martinez was present with a group of employees, when Beirel unlawfully removed an ILG leaflet from the light cable and instructed the employees not to take these papers because it was the mafia. In the summer of 1989, on a number of occasions, Beirel instructed Martinez and other employees not to accept the ILG literature.

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In 1989, Martinez circulated a petition for the ILG amongst her fellow employees, which had been given to her by an ILG representative. Martinez also was given a coffee mug which prominently displayed the name International Ladies' Garment Workers' Union, as well as the statement "look for the union label". Martinez kept this coffee mug at her machine at Respondent's premises. She would use the mug while eating lunch at the lunch table, in the presence of Pablo who would frequently join the employees for lunch at the same table.

Additionally, Martinez would drink from her mug at her machine, during which time brother Beirel and Pablo would walk by from 8-25 feet away from her.

On December 1, 1989, the merrow machine operators received their pay for the Thanksgiving week. Martinez, as well as a number of the other operators discussed among themselves their mutual dissatisfaction with the amount of holiday pay that they had received for Thanksgiving. Beirel came over to the group of employees and asked Martinez what was the problem. Martinez replied that she was not happy with the holiday pay, and that "we had worked all week long and we hadn't made money ... and we were neither slaves or children to do that". Beirel then told Martinez that if she didn't agree with that, she could leave. Beirel then stated that if Martinez wanted to talk to him, she should go to the office. Martinez told Beirel to wait a minute because she was finishing with a part.

Beirel at that point became incensed, came over to her machine, broke the threads from the machine, and told

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Martinez to leave quickly. Beirel then pulled her chair and Martinez' shoulder causing her to injure her knee. Beirel then pushed Martinez to the door while screaming and yelling that he "didn't want neither insects or roaches there". Beirel added that he was going to clean the factory and that he was going to fire everyone outside and was going to close down. He continued to scream that he was going to close the factory four or five times. When they reached the door, Beirel told Pablo that Martinez didn't respect him and that she should leave. Beirel would not permit Martinez to gather some of her belongings such as an umbrella, scissors and the coffee mug described above.

Shortly after Martinez' termination, Funez heard Respondents' supervisor Vicky tell a group of employees that Martinez was terminated because she kept a coffee mug with an ILG insignia at her work station.

At some point after the discharge, Local 17-18 filed for arbitration protesting the discharge of Martinez. The arbitrator, after a hearing overturned the discharge and ordered Martinez to be reinstated.

Respondents adduced no testimony or evidence as to why they terminated Martinez.

Once more a strong prima facie case that protected conduct of Martinez was a motivating factor in her termination has been established. Respondents argue that no evidence was adduced to show that Respondents were aware of any union activities on the part of Martinez. I do not agree.

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I conclude, contrary to Respondents' assertion, that they were aware of the fact that Martinez used a coffee mug with the name ILG prominently displayed therein. Since Pablo regularly had lunch at the same table with Martinez and the other employees when she used the cup, I find it likely that he observed and read the logo on the cup. I also find it probable that Beirel and Pablo observed her drinking from the mug while at her machine. Most significantly, I rely on the admission against Respondents by the statement made by its supervisor Vicky, that Respondents terminated Martinez because of the coffee mug at her work station. This constitutes an admission establishing knowledge of her union activity, as well as substantial evidence connecting her discharge to such activity. Moreover, at the time of the discharge, while Beirel was ranting and raving, he mentioned the "people outside", obviously referring to the union representatives outside the plant distributing literature, and threatened to close the factor five times. Finally, Martinez was one of the employees present when Beirel ripped an ILG flyer from the light string, and unlawfully instructed employees not to accept these papers, while saying "that's the mafia". Based on these circumstances, an inference is clearly warranted that Respondents knew or at least suspected that Martinez was a supporter of the ILG.

Moreover, I also conclude that Martinez' conduct on the day of her discharge, of protesting on behalf of herself and the other employees, Respondents' holiday pay, and her statement that the employees were not slaves or children, constitutes protected concerted activity. Since the discharge itself occurred immediately after the confrontation between

Martinez and Beirel, I find that this activity was a motivating factor in Respondents' decision to terminate her.

Based upon the animus directed towards the ILG as detailed above, including the statement made by Nieves, and the close proximity of Martinez's discharge to the unlawful discharge of Nieves, I conclude that Martinez' activities on behalf of the ILG was also a motivating factor in Respondents decision to discharge her.

Once again since Respondents have adduced no evidence as to their reasons for terminating her, they have again failed to meet their *Wright Line* burden of establishing that they would have taken the same action against her, absent her protected conduct. Similarly, as in the case of Nieves, the evidence that Martinez was discharged for no apparent valid reason, plus Beirel's conduct in screaming at her, pulling a chair out from under her and pushing her at the time of the discharge, further reinforces my conclusion that her discharge was violative of Section 8(1)(1) and (3) of the Act.

I also find that as in the case of Nieves, Respondents independently violated Section 8(1)(1) of the Act by verbally abusing and assaulting Martinez because of her protected activities, at the time of the discharge. *Kenrich supra.*

F. THE ALLEGED DISCRIMINATION AGAINST ISRAEL GALARZA

Galarza was employed by Respondents as a mechanic since 1983, and was responsible for the

maintenance of some three hundred sewing machines. He was paid $1,200 per week, $200 by check and the rest in cash.

In October of 1990, Beirel directed Galarza not to speak with Nieves, because she was trying to introduce the ILG. A few weeks later, Beirel again admonished Galarza not to speak to Nieves because she wants to "get the other Union into the factory." Beirel coupled this remark with a threat to close if the ILG gets in. In November while ordering Galarza not to fix Nieves' machine unless Pablo approves, Beirel added that she "is a very bad woman...and wanted to hurt him by getting the Union in." During this same conversation, Beirel informed Galarza that he knew that Galarza was still talking to Nieves and he must stop it. In early December, Beirel again admonished Galarza about speaking to Nieves, this time coupling the warning with a threat that Galarza "would be damaged".

Subsequent to this conversation, in December of 1990, Sarah Stern and Lupo Diamond began to consistently criticize Galarza's work and require him to fix the machines again, even though the machine operator was satisfied with the repair and the machine was operating properly. At times, Stern or Diamond would force him to fix the very same machine three to five times. Galarza tried to complain to Beirel about this excessive supervision, but Beirel responded that he was too busy to speak with him.

Meanwhile, notwithstanding Beirel's instructions, Galarza continued to speak with Nieves about personal or

job related matters, although they had no discussion about Unions.

On December 20, 1990, Beirel notified Galarza that he would receive no year-end bonus and his pay would be reduced from 15 to 20%. Galarza went home sick when Beirel notified him of these matters. Beirel called Galarza at home, and convinced him to return the next day in return for the payment of $1,000 of his bonus payment.[28] Respondents did not cut Galarza's pay at that time, despite Beirel's threat to do so.

In February of 1991, Beirel informed Galarza that he knew that he was still talking and driving with Nieves,[29] and that Beirel "forbid it" because Nieves "is a bad woman", and was trying to get the Union in.

On Friday, March 1, 1991, Respondents finally carried out their threat to reduce Galarza's salary. He was given a check for $625, which amounted to a reduction from $740 (which includes $260 in deductions from his previous non-payroll compensation of $1,000). When Galarza protested this reduction, Beirel agreed there was a mistake, took the check and returned with another check for even less money $543 and gave it to Galarza. Galarza threatened to expose Respondents to the Labor Department. Subsequently, Galarza agreed to voluntarily resign, in

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[28] In 1989, Galarza received a bonus of $2,000.

[29] As noted above, on occasion Nieves would drive Galarza to the subway station and drop him off there.

exchange for being paid his full salary for that week plus one week's severance pay. Galarza signed a letter that he voluntarily resigned.

Respondents contend initially that the allegations with respect to Galarza should all be dismissed based on Galarza's alleged lack of credibility. I do not agree. While Respondents do point to some minor contradictions between his testimony and that of Nieves, I found Galarza to be a candid and believable witness, and my factual findings detailed above are based primarily on such credited testimony, which I note has not been contradicted, challenged or denied by any witness of Respondents. Moreover, Respondents have adduced no evidence or witnesses as to why they took any of the above-detailed actions against Galarza, including particularly the change in supervision, cutting of his bonus, or the reduction of his salary.

In applying the *Wright Line* criteria to these changes in Galarza's working conditions, I conclude that General Counsel has established that protected conduct was a motivating factor in these actions. In this regard, I note that despite the lack of evidence that Galarza himself engaged in any union or protected activities, it is clear that Respondents perceived him to be a friend of Nieves. Thus, Respondents have constantly admonished Galarza for violating their previous instructions (which I have previously found unlawful) not to speak to Nieves, while accompanying these admonishments with references to Nieves' activities on behalf of the ILG. It is well settled that adverse action against an employee who is not known to have engaged in

Union activity, but who has a close relationship with a known Union adherent may give rise to an inference of discrimination. *BMD supra* at 143; *Permanent Label Corp.* 248 NLRB 118, 136 (1980) enfd. 657 F2d 512 (3d Cir. 1981). Thus, action taken by an employer motivated by an employer's belief or suspicion than an employee engaged in union activity violates the Act. *BMD supra; S&R Sundries* 272 NLRB 1352, 1356-57 (1984).

I have already concluded that Respondents by their discharge of Nieves, (a leading adherent for the ILG), as well as by their subsequent unlawful treatment of Nieves after her reinstatement, including their unlawful instruction to employees not to speak with her, violated Section 8(a)(1) and (3) of the Act.

I conclude therefore that since Galarza disobeyed these unlawful instructions and continued to converse with Nieves, that Respondents believed that Galarza as a result of his relationship with Nieves, was also an adherent of the ILG. I also find that based on the timing of the adverse actions, concurrently with or shortly after Respondents' continued unlawful admonishments to Galarza not to speak with Nieves, and the other unfair practices found against Respondents, most particularly the discrimination against Nieves, that Respondents closer supervision of Galarza, and their decision to reduce his bonus and cut his pay, were motivated by their belief that Galarza as a result of his association with Nieves, was also a supporter of the ILG.

Once again, since Respondents have adduced no evidence that any of these actions would have taken place,

absent their perception of Galarza's support for the ILG, they have violated Section 8(a)(1) and (3) of the Act. I so find.

I also conclude that the changes instituted in Galarza's working conditions, i.e. the closer supervision, reduction of his bonus, and most significantly the substantial reduction of his salary, were so intolerable so as to force Galarza to resign, and that Respondents would reasonably have expected Galarza to quit as a result of these changes. In these circumstances a finding of constructive discharge is warranted. *Allgreco Sportswear Co.* 271 NLRB 499, 500 (1984); *Manufacturing Services, Inc.* 295 NLRB 254, 255 (1986); *Bronx Metal Polishing, Inc.* 276 NLRB 299, 304-305 (2985); *BMD supra* at 160-161.

Thus, the changes in working conditions made Galarza's continued employment with Respondents untenable and compelled his resignation. The foreseeability of his resignation, coupled with Respondents' animus, combines to support a finding that this was the intended result of Respondent's conduct. *BMD supra, Bronx Metal supra.*

Accordingly, I conclude that Respondents have violated Section 8(a)(1) and (3) of the Act by constructively discharging Galarza.

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G. ALLEGED DISCRIMINATION AGAINST ROSITA CHALSTON

Rosita Chalston was hired by Respondents in March of 1989 as a floor worker. She worked on the 5th floor at 144 Spencer Street under the supervision of Gary. In early November of 1989, Chalston received a petition from a representative of the ILG, and was asked to obtain signatures from employees on said petition. The petition reads, "we the workers of Three Sisters, signing this petition wish to be represented for collective bargaining with our Employer by the International Ladies Garment Workers Union."

On November 13, 14 and 15, Chalston during lunch hour solicited employees to sign the petition. Chalston signed the petition first, explained the purpose of the petition, and obtained the signatures of some fourteen other employees. On November 15, Arlene, one of the shop stewards for Local 17-18 was walking around in the lunch area, during lunchtime when Chalston solicited signatures from employees.

At around 4:30 p.m. that same afternoon while in the bathroom, Chalston was approached by employee Cathy Lopez, who also acts as a translator for Gary in connection with discussions with employees. Lopez told Chalston that somebody had informed Gary about the petition. Lopez added that Chalston was going to be fired.

As she emerged from the bathroom, Chalston observed Gary talking with Arlene. As Gary and Arlene

were looking at Chalston, Gary nodded his head. At the end of the day, at 5:00 p.m., Chalston went to the time rack to punch out, and noticed that her timecard was missing. She asked Gary, "Where is my card?" Gary replied that she was fired and that he no longer needed her. She asked why? Gary responded, "because I don't need you anymore". As they were walking out, Chalston asked for the reasons in writing, but Gary refused, stating that "I don't feel like it."

Later that same week, Chalston saw a want ad in the Spanish language newspaper "El Diario" for floor workers for Three Sisters.

The next week Chalston visited the offices of Local 17-18. She spoke to Javier Jara, a business representative for Local 17-18. She explained to Jara that she had been terminated because she had solicited signatures for the ILG. Jara told her that the ILG wanted to destroy Local 17-18, but he would not allow it. Jara asked Chalston who else had signed the petition, but she did not tell him.

Jara then made a telephone call to Respondents, and informed Chalston that she had been absent from work four times in eight months. She replied that this was not such a bad record. Jara told Chalston that he would help her get her job back, but she would have to sign a warning.

On December 11, Chalston went to the shop with Jara. At that time she signed a written warning, which had been countersigned by Gary.

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In this connection, Chalston was never spoken to be management officials about any of the four absences over an eight month period. on each of the absences, Chalston called Respondents and notified Gary that she was not going to be in that day.

When Chalston returned to work on December 11, she noticed 26 to 27 new employees working on the floor, who had not been employed by Respondents prior to her termination on November 13.

After she returned to work on December 11, Chalston solicited employees to sign authorization cards for the ILG at lunchtime near the lunch table. Sometime, in late December 1989 or early January 1990, Chalston was approached by Maria Reina. Reina was a merrow machine operator, who as noted was also one of the shop stewards for Local 17-18. Previously, Respondents had permitted Reina to make announcements over the then public address system concerning Local 17-18 matters. Some of the announcements referred to the need to support Local 17-18 and that employees would have to be united.[30] Funez in her affidavit recalls someone made an announcement over Respondents' loudspeaker, who she did not know, in support of Local 17-18.

On the date of this conversation, Chalston observed Reina go into Beirel's office, and remain there speaking with

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[30] Apparently at this time there was some sort of an "affiliation" vote pending involving Respondents' employees, Local 17-18 and the ILG. The Record is not clear as to the precise nature of the vote, or who was conducting said vote, but it appears that it was not the NLRB, since the petitions filed with the Board by the ILG has not resulted in any election being scheduled.

Beirel for forty-five minutes. When Reina emerged from Beirel's office, she approached Chalston at her machine. Reina told Chalston that she was too smart to be collecting signatures for the ILG, and if Beirel found out about it, she could be fired.

On January 19, 1990 after Chalston punched in at 8:03 a.m., Pablo grabbed her card, scratched out the punch, and said "no more work". Chalston asked if was because she missed days, and added that she and her husband had called. Pablo replied, "no, no, no more work."

At that point, Chalston went to see Beirel, and told him that Pablo had fired her. Chalston explained that her child had been sick and that she had doctor's notes to prove it, which she showed to Beirel. Beirel replied that her child was always sick. Chalston offered to go on piecework. Beirel refused this request, and told her to go home, take care of her child and return to work on February 15, 1990.

On February 15, as ordered by Beirel, Chalston returned to Respondents' premises. She saw Beirel and asked if he had work for her. He replied, "Yes, no problem." At that moment, Barbara, Beirel's secretary asked to speak to Beirel, and showed Beirel some papers. When he returned, Beirel informed Chalston that he was not going to permit her to return to work. Beirel told her that he would "see you in court because you put me into something this big". The ILG filed amended charges with the Board, dated 1/31/90. Prior charges filed with the

Board in Case No. 29-CA-14495 on 11/24/87 had made specific reference to Chalston's termination on 11/15/89.[31]

Subsequently, Local 17-18 filed for arbitration on behalf of Chalston, resulting in her reinstatement on March 4, 1991. On her first day back to work, after an hour of work, Gary, issued her a warning for speaking to other employees. The warning was for "constantly talking to other workers". No other employees received such a warning, and with the exception of the above described incidents regarding employees talking to Nieves, there is no evidence of any incidents of employees being told not to talk to other employees. As noted above in connection with Nieves, employees are constantly speaking to one another during the course of the workday, and are neither spoken to or disciplined about such activities. Moreover, Chalston's unrebutted testimony establish that she had not been speaking to anyone in the hour that she had been working on that day.

After her reinstatement on March 4, 1991 and until Gary was replaced as supervisor by Asian Doug in May of 1991, Gary began to supervise her more closely. Whenever Chalston would lift up her head from her work cutting threads, to look around, Gary would clap his hands, and she would lower her head. Gary would do this about five times, per day. He had never clapped his hands in this manner, prior to Chalston's termination.

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[31] On March 30, 1990, the Director issued an Order Consolidating Cases and Consolidated Complaint alleging among other violations, that Respondents violated Section 8(a)(1) and (3) of the Act by issuing a warning to and discharging Chalston in December and November respectively.

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Chalston worked on March 4 and March 5, and was told at the end of the day that there was no more work for her and not to come in on March 6, the next work day. Chalston worked a total of 3 1/2 days during the first week after her reinstatement, thereby losing 1 1/2 days of work. She was told by Gary that there was no work cutting threads. Chalston testified that other employees performing the cutting of threads during that week were also told not to come in because there was no work. Although other employees cutting threads were also told not to come to work, employees performing ticketing, and putting clothes on hangers were not laid off, even though Chalston had performed that work in the past. At least ten of the floor workers who were not laid off, and who were performing work such as ticketing and hanging, had less seniority than Chalston.

In May of 1991, Gary was replaced as supervisor of the floor employees by Asian Doug. On May 13, 1991, work was slow cutting threads, so Doug assigned Chalston to ticket garments. At 10:00 a.m., while Chalston was ticketing garments, she observed Beirel speaking with Doug at the same time that they looked in her direction, Immediately after the conversation between Beirel and Doug, Doug reassigned Chalston to work on threads. In the late morning, Chalston and 19 other employees who had been performing thread cutting were told that there was no more work for them, and to call Respondents on May 20 to see if there is work available. As Chalston was leaving work at 12:30 p.m., she noticed that ten employees out of the twenty employees who had been cutting threads, were still

working.[32] On May 15 and 16, Chalston returned to the shop, and again noticed that the less senior employees including the seven threaders whose layoff had been retracted, were still working for Respondents, performing jobs that Chalston had performed in the past.

Chalston called on May 20 as instructed, and was told by Asian Doug to report on May 21 and she worked on May 21, May 22 and 23. On May 23, Chalston was informed that there was no work for her for Friday, May 24. On that day, when she received her paycheck, she and another employee complained to Doug about the fact that less senior workers were being permitted to remain at work. Doug replied, "Forget it, I know what I am doing." Chalston worked the next week, and on Monday, June 3. A t that time, she was laid off until June 10, when she returned to work.

In assessing whether General Counsel has met its *Wright Line* burden, it is essential that part of that burden include proof that Respondents had knowledge of the union activities engaged in by Chalston at the time of various alleged discriminatory acts taken against her. However, it is well established that "knowledge may be proven by circumstantial evidence from which a reasonable inference may be drawn.... Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the

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[32] The group of employees with less seniority than Chalston, also included seven of the ten employees who were cutting threads on May 13, and who were originally told to leave, but continued to work that day.

pretextual reasons for the discharge asserted by the employer." *BMD supra* at 142-143.

Turning to the initial termination of Chalston, the evidence discloses that she was terminated on November 15 three days after she began soliciting employees to sign an ILG petition, and the same day that she was observed doing so by Arlene, a shop steward for Local 17-18, and told by Cathy Lopez who translates for Respondents, that someone had informed Gary about the petition and she was going to be fired. General Counsel and the Complaint alleges that Arlene and Lopez are both agents of Respondents, and seeks to attribute knowledge of Chalston's union activities through these individuals to Respondents. I do not believe that General Counsel has adduced sufficient evidence that either Lopez or Arlene, are agents of Respondents, but I nonetheless am convinced that an inference that Respondents became aware of her protected activities prior to the November 15 termination is warranted.

Thus, I have found that Respondents have violated Section 8(a)(1) and (3) of the Act by numerous act of interrogations, threats, promises of benefit, creating the impression of surveillance, and the unlawful discharges of and other discriminatory conduct towards Nieves, Martinez and Galarza in or about the same period of time. In addition, based on these violations it is clear that Respondents had general knowledge of employees' union activity. *BMD supra.* I also conclude that the reason asserted by Respondents to Chalston for the initial discharge, that she "was not needed anymore" is clearly pretextual, inasmuch as Respondents were constantly hiring

employees and had an ad in the paper for new employees at the time that it allegedly did not "need" Chalston. Moreover, when the Local 17-18 representative called Respondents, it appears that he was given a different and another pretextual reason for the discharge. Thus, it appears that he was given a reason of four absences over an eight month period, which does not seem to be the real reason for Respondents' actions, since Chalston always called to notify Respondents about her absence, and she was neither spoken to nor warned about her absences by Respondents' officials.

These factors, coupled with the timing of the termination, coming on the same day that Chalston was observed soliciting for the ILG by a shop steward for Local 17-18, the Union favored by Respondents, as well as Chalston being informed by an employee that Respondents had been notified of her activities and that she would be fired, permits an inference which I draw that in fact Respondents were told about and were aware of Chalston's union activities prior to her discharge.[33]

Therefore, particularly in light of the absence of any legitimate basis for the discharge, *BMD supra* I conclude that General Counsel has established a prima facie case of discrimination with respect to Chalston's discharge on November 15. Since Respondents have presented no evidence of why it terminated her on that day, they have not

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[33] I need not decide specifically whether Arlene, Lopez or someone else informed Respondents about Chalston's activities. I merely conclude based on the above factors that Respondents became aware of Chalston's activities on behalf of the ILG before it discharged her on November 15, 1989.

met their burden of demonstrating that the discharge would have occurred even in the absence of her protected conduct, and have therefore violated Section 8(a)(1) and (3) of the Act.

Turning to the written warning on December 11, I have found that Chalston signed this document, as a result of Jara's successful efforts to obtain her reinstatement. Since I have found the discharge itself on November 15, allegedly for the same pretextual reason, i.e. absences, to be unlawful, it follows that the warning that she was compelled to sign as the price of her reinstatement from this unlawful discharge is also unlawful. I so conclude, particular where once again Respondents have adduced no evidence as to why they issued the warning, or whether they would have taken the same action absent Chalston's union activities.

As to Respondent decision to lay Chalston off, on January 19, 1990, it is noted that she continued her activities on behalf of the ILG, even after her reinstatement on December 11, 1989, as a result of the efforts of Local 17-18. Respondents' knowledge of this activity is in part dependent upon the agency status of Maria Reina. Although I have concluded above that the mere fact that Reina was permitted to use Respondents' loudspeaker to make announcements on behalf of Local 17-18, is not sufficient in itself to make her an agent of Respondents' that finding is not dispositive of her status in this instance. Thus, I have found that Chalston observed Reina talking to Beirel in Beirel's office for forty five minutes. Immediately thereafter, Reina approached Chalston and told her that she was too smart to collect signatures for the ILG and if Beirel

discovered this, she could be fired. In these circumstance, I conclude that coupling these events with the loudspeaker permission and the fact that Reina's statements mirrored similar remarks made by Beirel to other employees, tips the scale in favor of concluding that Chalston could reasonably construe Reina as speaking on behalf of Respondents with respect to these statements to Chalston. *EDP supra; Wm. Chalston supra; Community Cash supra.* Therefore, it is appropriate to infer that Respondents became aware of Chalston's continued union activity between December 11, 1989 and January 19, 1990 when she was laid off.

However, even absent a finding of the agency status of Reina, I would still conclude that General Counsel had established a prima facie case that her layoff on January 19, 1990, was motivated by her union activity. Thus, Respondents' previous knowledge of her support for the ILG which resulted in her initial discharge on November 15,[34] coupled with the other contemporary unfair labor practices involving the other employees, is sufficient to so conclude, particularly where once again Respondents purported explanations do not withstand scrutiny. Thus, initially when Pablo notified Chalston of her layoff, he told her that there was "no more work" for her, which was clearly not the case, and was contradicted by Beirel who told her that she was merely laid off for a month, "to take care of her sick child". Although Chalston had missed two days of work because of the sickness of her child, she had called in

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[34] I would also note that the ILG filed a charge with the Board on November 24, 1989 in Case No. 29-CA-14905, alleging that Respondents terminated Chalston on November 15, because of her knowledge of her support for the ILG by Respondents prior to the January lay off, as well as the unlawful warning issued on December 11, 1989, as detailed above.

pursuant to company procedure to notify Respondents. Therefore, a finding is warranted that a motivating factor in the layoff of Chalston on January 19 was her activities on behalf of the ILG. Once again, Respondents have adduced no evidence as to why they laid her off on that date, and have not therefore met their burden of demonstrating that they would have laid off Chalston, absent her protected conduct. Therefore, they have violated Section 8(a)(1) and (3) once again.

On February 15, Chalston reported to work as initially ordered, at the conclusion of the four week layoff. Beirel on February 15, after agreeing to allow her to return to work, on that date, changed his mind after reading some papers given to him by his secretary.

Since an amended charge was filed on January 31, 1990, I infer that Respondents received this document or some other Board document on February 15, which caused Beirel to change his mind about her recall, particularly since Beirel told Chalston that he would see her "in court", because she put him "into something big". These facts are sufficient to establish a prima facie case, that Respondents' decision to refuse to recall Chalston on February 15, 1990, as they previously had agreed, was motivated by her union activities, as well as the fact the charges had been filed on her behalf at the NLRB. Since, once more, Respondents have not been given an explanation as to why they took this action, they have again not met their *Wright Line* burden that they would not have recalled her on February 15, absent her conduct. Therefore, by this action, Respondents

have violated Section 8(a)(1), (3) and (4) of the Act. I so find.

Chalston was finally recalled on March 4, 1991, after an arbitration award ordering her reinstatement. An hour after she commenced work on that day, she was issued a written warning for "constantly talking with other workers." Since the only other instance in the record of employees being told not to talk to other employees was the unlawful instructions issued by Respondents that employees not speak to Nieves, and Chalston spoke to no one at all during the hour that she was working, I find the purported reason for this warning to be clearly pretextual. Coupling this with the previously found discrimination against Chalston and the other employees, a finding is warranted that Respondents' issuance of the warning on March 4, 1991 was motivated by both her activities on behalf of the ILG as well as the fact that charges were filed on her behalf with the NLRB. Since once more Respondents have failed to adduce any evidence of their reasons for the warning they have not met their *Wright Line* burden and have violated Sections 8(a)(1)(3) and (4) of the Act.

From March 4 to the date in may when Gary was replaced as supervisor by Asian Doug, Gary would supervise Chalston more closely, by clapping his hands whenever she would raise her head. Since this humiliating procedure had never been utilized by Gary, prior to her reinstatement, based on the above discrimination against Chalston, I conclude that again a prima facie case has been established that this action of Respondents was motivated by her as activities on behalf of the ILG, as well as the filing of Board

charges on her behalf. Respondents' failure to offer any evidence of why they engaged in this practice, once more leads to the conclusion which I make, that they have failed to meet their *Wright Line* burden and have thereby violated Section 8(a)(1)(3) and (4) of the Act.

Between March 6 and March 8, Chalston was laid off for a total of 1 1/2 days. She was also laid off for part of the day on May 13 and June 3, and on May 14, 15, 16, 17 and 20, and June 4 though June 7. On each of these days, the evidence does disclose that Respondents also laid off other employees performing threading, which was the work being performed by Chalston at the time. However, Chalston had also performed other types of floor workers' work such as ticketing and hanging garments in the past. Employees performing these tasks were not laid off during the days that Chalston was laid off, notwithstanding the fact that Chalston had more seniority than many of these employees who continued to work.

Respondents' conduct in connection with the layoff on May 13, is particularly revealing, and leads me to conclude that they singled out Chalston for inclusion amongst the employees in all of the above-described layoffs for discriminatory reasons.

Thus, Supervisor Doug had on May 13, reassigned Chalston from cutting threads to ticketing garments. At 10:00 a.m. that morning, Chalston observed Beirel speaking with Doug and looking in her direction. Immediately thereafter, Doug reassigned her to cutting threads, and at 12:30 that day, the threaders were laid off. I find this

sequence, particularly in the absence of any explanation for the reassignment of Chalston back to cutting threads, to be demonstrative of an intent by Respondents to make sure that Chalston was included in any possible layoff. I further find, that in view of the sordid history of Respondents' continuing discrimination against Chalston, from her November discharge, her December warning, her January layoff, the February refusal to recall, to the appalling practice of Gary clapping his hands whenever Chalston looked up from her work, the reason for Respondents' action was Chalston's protected conduct. I also note in this regard the fact that as to this May 13 layoff, half of the 20 threaders who were originally told of their layoff, apparently were not laid off, and continued to work, while Chalston was laid off. This group of ten threaders who continued to work, included seven employees with less seniority than Chalston. Finally, Chalston also was more senior than many other floor workers who were not laid off during any of the intermittent layoffs of Chalston in March through June, even though Chalston had frequently performed other floor worker tasks such as ticketing and hanging. Indeed, as noted, she was performing ticketing on the morning of the May 13 layoff, before being reassigned to threading, to as I have found make sure that she was included in the group of employees to be laid off.

Accordingly, based on the foregoing, I conclude that General Counsel has established that a motivating factor for all of the intermittent layoffs detailed above, from march through June of Chalston, was Chalston's protected activities. Inasmuch as once again, Respondents have provided no explanations as to why they were so anxious to

include Chalston in the layoffs, or any other evidence as to why she was laid off, while more senior employees were retained, they have not met their burden of establishing that they would have taken the same action against Chalston absent her protected conduct. Therefore, I find that Respondents have thereby violated Section 8(a)(1), (3) and (4) of the Act.

H. THE ALLEGED DISCRIMINATION AGAINST SILVIA SILVERIO

Silvia Silverio, after answering an ad in the newspaper, was hired by Respondents on April 18, 1991. When she arrived at 144 Spencer Street, she reported to the 5th floor where she was given a written application to fill out. The application called only for her name, address and social security number, and did not request any information as to where Silverio had previously worked.

After Silverio completed the application and answered all the questions included therein, she was asked by Vicky to operate Respondents merrow machine for one hour. She completed work on a blouse, performing work on the shoulders, sleeves, and cuffs. After completing work on the blouse, Vicky told Silverio that she was a very good worker, and offered her a job as a piece worker, starting on Monday, April 23, 1991. Neither Vicky nor any other official of Respondents asked Silverio where she had worked before.

In fact, Silverio had worked at a company called Rubies Costume located at 120-08 Jamaica Avenue. At

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Rubies, Silverio had been involved in an ILG organizing campaign, and had signed up 70-75 employees for the ILG and was a member of the ILG organizing committee. Silverio was terminated on March 8, 1991. Subsequently, pursuant to charges filed by the ILG, a complaint was issued by the Region alleging that Silverio as well as a number of other employees were discriminatorily discharged because of their activities on behalf of the ILG. The trial in that case was scheduled to be heard on October 31, 1991.

On Monday, April 22, 1991, Silverio reported to work for Respondents as scheduled. Vicky explained to her that Respondents' work on a piece work system for the merrow machine operators, and that the employee is given bundles to work on, with each one containing a ticket. The employee on each Monday, was supposed to hand in all the tickets for each item that the employee completed to the office, so that their pray could be computed. Since Silverio started work on Monday, April 22, she was told to keep all her tickets for that week, and turn them in to the office on April 29, the next Monday.

Silverio worked for three days, April 22, 23, and 24, during which time Vicky was constantly complimenting her on the quality of her work, and told her two or three times a day that she was a very good machine operator, and she was doing a good job.

On Wednesday, April 24, at 4:30 p.m., Silverio was summoned to the office over the loudspeaker. She was spoken to by a secretary, and asked where she worked before. Silverio did not tell the secretary that she worked at

Rubies, because she feared that her ILG support would be disclosed if Respondents called Rubies. Therefore, she told the secretary about her prior job at Signe Star located at 523 Kent Avenue.

The next day, Silverio was again summoned over the loudspeaker by the same secretary. The secretary asked why Silverio hadn't told her that she (Silverio) had worked at Rubies Costume. Silverio replied that she didn't work at Rubies. The secretary responded that yes Silverio had worked at Rubies and told Silverio to give her Silvero's job tickets. Silverio replied that she didn't have them with her, and the secretary instructed her to bring them the next day.

The next day, April 26, Silverio worked until 4:30 p.m., when she was again summoned to the office over the loudspeaker, and then was asked by the secretary for her tickets. Silverio gave the secretary her tickets as instructed. The secretary told her that she "didn't have more work there". Silverio went back to her machine to finish the bundle that she was working on. The secretary immediately called her into the office, and said to Silverio, "I told you that you don't have more work here. I told you to leave." Silverio replied that she was finishing a bundle for which she had already given the ticket to Respondents. The secretary repeated that Silverio must leave because she didn't have any more work here. The secretary gave Silverio her check and told her, "get out of her, get out of here". The last conversation between Silverio and the secretary occurred in the presence of other supervisors of Respondents in the office.

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Silverio never told anyone at Respondents that she had worked at Rubies. However, starting on April 22, Silverio had been carrying in her work bag a copy of her 1989 tax return which included a W-2 form from Rubies. She had intended to apply for food stamps, which is why she was carrying these items with her in her work bag.

After her termination from Respondents, she decided not to apply for food stamps, so she placed her work bag in a locked closet in her apartment, until she worked in July of 1991. At that point, she looked into her bag and discovered that her tax form and W-2 form which had been attached to the return for Rubies, were missing.

Respondents adduced no evidence as to why it terminated Silverio, nor as to how they found out she had worked at Rubies, or why they were concerned that she worked there. Respondents' attorney in their brief, however, contends that Silverio was "discharged for lying on her employment application".

It is once again necessary to apply the *Wright Line* criteria in evaluating the lawfulness of Respondents' termination of Silverio. Respondents' animus towards the protected activities of their employees is amply demonstrated by the above-described unfair labor practices that I have found, particularly the discrimination against Nieves, Chalston, Martinez and Galarza. The timing of the discharge of Silverio in April of 1991, comes in the midst of the continuation of Respondent's campaign of discriminatory treatment towards these employees. That leaves the question of Respondents' knowledge of Silverio's

union activities, concerning which General Counsel has adduced no direct evidence.

As Respondents point out, General Counsel has not introduced any direct evidence that Respondents knew of Silverio's activities on behalf of ILG, while she worked at Rubies. Indeed, General Counsel has not even directly established that Respondents knew that there was any union activity at Rubies, or that Silverio was a subject of an NLRB complaint alleging her discharge was motivated by her ILG activities.

However, as noted above, it is well settled that absent direct evidence, knowledge may be proven by circumstantial evidence from which a reasonable inference may be drawn. Some of these circumstances can include employers' demonstrated animus; the timing of the discharge and the pretextual reasons asserted by the employer. *BMD supra* at 143; *Hunter Douglas v. NLRB* 808 F2d 808, 814 (3rd Cir. 1986); *Darbar Restaurant* 288 NLRB 545 (1988); *Dr. Frederick Davidowitz DDS* 277 NLRB 1046, 1049 (1985); *Long Island Airport Limousine, Inc.* 191 NLRB 94, 95 (1971), affd. 468 F.2d 292, 295-6 (2nd Cir. 1972).

Here, there can be no dispute that Respondents found out about the fact that Silverio had been employed at Rubies, and that this fact precipitated her termination. Thus, I need not and do not decide whether or not Respondents found out by rummaging through her bag, as urged by General Counsel, or by a phone call as suggested by Respondents, or by some other method.

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Respondents contend that Silverio was fired for "lying" about her employment at Rubies. However, initially it must be noted that Respondents introduced no testimony or other evidence that Silverio was fired for lying, or why they even asked Silverio about her prior employment, or why they were concerned that she may have worked at Rubies. Moreover, contrary to Respondents' assertion, Silverio was not told that she was fired for lying, but that Respondents had no more work for her, which is clearly a pretextual reason, since there is no question that there was no shortage of work at the time, and Respondents concede that lack of work was not a reason for the termination, by their assertion that she was fired for lying.

However, Respondents' assertion that Silverio was terminated for "lying", even if testimony had been given to substantiate such a claim, begs the question. Respondents have adduced no evidence of any legitimate reason as to why they asked about her prior employment, nor did any supervisor ask her about it prior to her hire. She performed well on the test administered to her operating the machine by Vicky, and was complemented by Vicky regularly on her work quality, during her four days of employment by Respondents.

Accordingly, in view of the animus of Respondents, the timing of the discharge, and in the absence of any legitimate basis for Respondents' concern about Silverio's employment at Rubies, I infer that Respondents when they found out about her employment there, which they admit, also found out that the ILG had been organizing there, that Silverio was a union activist, and that an NLRB complaint

had issued alleging her discharge to have been in violation of the Act. *BMD supra*; *Hunter Douglas supra; Long Island Limousine supra.* Therefore based on the foregoing, a prima case of discrimination with respect to Silverio has been established. Inasmuch as Respondents have been introduced not evidence to meet their *Wright Line* burden, they have not established that they would have terminated Silverio absent her protected conduct, and have thereby violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondents' Three Sisters Sportswear Co., Bedford Cutting Mills, Inc., Three Sisters Apparel, Metropolitan Sweater Industries, Inc., United Industries, Inc., United Knitwear Industries, Ltd., Skylight Fashions, Inc., d/b/a/ Skylight Trading and 144 Spencer Realty Co. are single employers and alter egos of each other, and have been at all times an employer within the meaning of the Act.

2. International Ladies' Garment Workers' Union, AFL-CIO (ILG) and Local 17-18, Production Workers Union, AFL-CIO are labor organizations within the meaning of the Act.

3. Respondents by ordering and instructing employees not to accept and to rip up literature from the ILG, referring to the ILG as the MAFIA, promising their employees benefits to assist them in soliciting support for Local 17-18 from other employees, threatening their employees with discharge and closing of the factory if said employees supported the ILG or if the ILG came into the

factory, threatening employees with unspecified reprisals if they spoke to employees who supported the ILG, interrogating their employees concerning their activities and support of the ILG, and creating the impression among their employees that their activities or the activities of their fellow employees on behalf of the ILG were under surveillance by Respondents, have violated Section 8(a)(1) of the Act.

4. Respondents, by promising their employees benefits in order to assist them in soliciting support for Local 17-18 from other employees, have violated Section 8(a)(1) and (2) of the Act.

5. Respondents by on November 28, 1989, verbally abusing, blocking her from exiting, and discharging Carmen Nieves because of her support for and activities on behalf of and support of the ILG, and because she engaged in other protected concerted conduct, have violated Section 8(a)(1) and (3) of the Act.

6. Respondents by isolating the work station of Nieves from that of other employees, instructing their mechanic not to fix Nieves' machine at her request, assigning Nieves fewer bundles than those of other employees, forcing Nieves to wait longer than other employees to receive new bundles, assigning Nieves more complicated work than other employees, and supervising her more closely, all resulting in a reduction of earnings for Nieves, and by instructing other employees not to speak with Nieves, all because of Nieves' support for and activities on behalf of the ILG, and because she engaged in other protected conduct, have violated Section 8(a)(1) and (3) of the Act.

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7. Respondents, by verbally abusing, assaulting, and discharging Bella Martinez on December 1, 1989, because of her support for and activities on behalf of the ILG, and because of her exercise of other protected conduct, have violated Section 8(a)(1) and (3) of the Act.

8. Respondents by supervising Israel Galarza more closely, reducing his bonus in 1990, cutting his pay in march of 1991, by constructively discharging Galarza on March 1, 1991, and by discharging Silvia Silverio on April 26, 1991, because Respondents believed or suspected that these employees supported the ILG, have violated Section 8(a)(1) and (3) of the Act.

9. Respondents, by laying off Rosita Chalston on November 15, 1989, January 19, 1990, and intermittently between March and June of 1991, refusing to recall her as promised on February 15, 1990, issuing written warnings to her on December 11, 1990, and on March 4, 1991, and by supervising her more closely by their supervisors clapping their hands when Chalston looked up from her work, because of her support of and activities on behalf of the ILG, have violated Section 8(a)(1) and (3) of the Act.

10. Respondents, by refusing to recall Chalston as promised on February 15, 1990, issuing a written warning to her on March 4, 1991, laying her off intermittently between March and June of 1991, and by supervising her more closely by their supervisors clapping their hands when Chalston looked up from her work, because Chalston was the subject of an NLRB charge filed on her behalf by the ILG, have violated Section 8(a)(1) and (4) of the Act.

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11. Respondents have not violated the Act in any other manner as encompassed by the Complaint.

12. Local 17-18 has not violated the Act as alleged in the Complaint.

13. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have violated Section 8(a)(1)(2), (3) and (4) of the Act, I find it necessary to order them to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents unlawfully constructively discharged Israel Galarza and discharged Silvia Silverio, I recommend that Respondents be ordered to reinstate Galarza (at his prior salary) and Silverio, to their former positions of employment. Since I have also found that Respondents unlawfully laid off or discharged Carmen Nieves, Rosita Chalston and Bella Martinez, I shall also recommend that Respondents make whole Nieves, Chalston, Martinez, Silverio and Galarza for the discrimination against them.[35]

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[35] The discrimination against Nieves included various actions which reduced her employment opportunities, since she was a piece rate worker. Galarza was discriminated against by having his pay and his 1990 bonus reduced. The make whole remedy shall include reimbursing the employees for these acts of discrimination by Respondents.

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It is also appropriate to recommend that Respondents rescind the unlawful warnings issued to Chalston, and to remove from their files any references to unlawful warnings, discharges or layoffs of all of the discriminatees herein.

Charging party requests a number of extraordinary remedies, which it deems essential to properly remedy Respondents' conduct. *Texas Super Foods, Inc.* 303 NLRB No. 30 Slip op. p.1-3; (1991); *Monfort of Colorado, Inc.* 284 NLRB 1429, 1479 (1987); *Tidee Products,* 194 NLRB 1234-1235 (1972); *Heck's, Inc.* 215 NLRB 765 *J.P. Stevens, Inc.* 244 NLRB 407 (1979) *Auto Prod.* 265 NLRB 31 (1982).

Charging Party requests that Respondents be ordered to reimburse it for attorneys' fees expended by Charging Party in connection with the litigation of the instant matter, including the District Court enforcement proceedings that were necessary as a result of Respondents' refusal to comply with subpoenas of General Counsel. While recognizing that several outrageous unfair labor practices by itself, do not warrant the imposition of such a remedy, *Workroom for Designers, Inc.* 274 NLRB 840, 841-42 (1985), Charging party argues that the standards of *Hecks supra* and *Tidee supra* which requires frivolous litigation for such a remedy has been met.

Charging Party contends in this regard, that since Respondents called no witnesses and presented no defense to any of the unfair labor practices alleged, their defenses do not even rise to the level of "frivolous", since there has been

no defense whatsoever, I cannot agree with Charging Party's construction of what constitutes "frivolous" litigation.

The Board has generally been very hesitant in awarding attorney's fees to the charging party. It is appropriate where Respondent has raised patently frivolous defenses. *Super Save* 273 NLRB 20 fn.1 (1984); *Park Inn Home for Adults* 293 NLRB 1082 fn. 3(1989); *Heck's supra* 762-768. A frivolous defense is not merely found to be without merit, but refers to contentions "which are clearly meritless on their face." *Heck's Inc.* 191 NLRB 886, 889 (1971). Defenses are debatable rather frivolous, where allegations are dependent upon resolutions of credibility. *Hecks supra* at 768; *Workroom supra* at 842.

Although Respondents called no witnesses in this proceeding, they cross-examined General Counsel's witnesses vigorously, and were able to in some instances develop some inconsistencies and problems with the testimony of these witnesses. Thus, there were some significant inconsistencies between the testimony of Galarza and Nieves on pertinent matters, and the statements made by Respondents' officials to employees were made in English to Spanish speaking employees, which also raises some questions as to the ability of the employees to understand and/or recount what was said to them. While I have rejected Respondents' arguments that for these and other reasons, the employees' testimony should not be credited, I do not deem their assertions in this regard to be frivolous.

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Moreover, I also note that some of the violations here were supported and in some cases found solely based on the affidavit of Funez. Since she could not recall any of the alleged statements made to her by Respondents' officials in her affidavit, the allegations significantly supported by such evidence are not free from doubt. Thus, while I relied on Funez' affidavit for substantive evidence, this finding is not open and shut, since Funez could not even recall giving the affidavit in the first place.

Additionally, while Respondents gave no evidence as to the reasons for their alleged discriminatory actions, some of these complaint allegations were far from clear cut. Thus, the question of knowledge with respect to the discharge of Silverio is certainly not free from doubt, and similarly the initial layoff of Chalston took place before any direct evidence of Respondents' knowledge of her protected conduct. Indeed, the agency status of Maria Reina, which is also somewhat questionable, was relied upon in part to establish union activity prior to Chalston's second unlawful layoff.

It is also noteworthy that much of the litigation herein, dealt with the single employer-alter ego issues. In that area, although Respondents called no witnesses, General Counsel called a number of officials and representatives of Respondents as its own witnesses. In that connection, Respondents cross-examined these witnesses, and introduced documentary evidence on this subject.

While I have concluded as detailed above that the various entities did constitute a single employer and an alter

ego, Respondents' position that General Counsel had not established its case, cannot be construed as frivolous. This points up the flaw in Charging Party's argument. Once General Counsel has presented its case, Respondents are permitted to make a judgment that a prima facie case has not been made, either because of credibility problems, or legal insufficiency or some combination of both. As long as there is some rational basis for that decision, I do not believe that a Respondent can be subject to an order for attorney fees, merely because its judgment in that regard is later found to be in error.

Finally, Charging Party points to the need to resort to the United States District Court for subpoena enforcement, including sanctions for criminal contempt concerning which charging party claims it was actively involved. Charging Party characterizes the positions taken by Respondents in regard to and in those proceedings to be "nothing more than a frivolous attempt to prevent the Board from obtaining the documents which exposed their alter ego status." I do not agree.

Respondents did not make a blanket refusal to comply with the various subpoenas. They raised legitimate issues for their non-compliance in each instance. They initially refused to comply because General Counsel sought Respondents in this case. Although I refused to quash the subpoenas, finding that General Counsel's arguments as to relevance to be persuasive, I made that decision with some hesitation, and certainly cannot find Respondents' position in that regard to be frivolous.

Similarly, Respondents further refusal to comply, resulting in the contempt proceeding, was also based on a legitimate although meritless objection. Here, Respondents would not turnover the materials so ordered by the District Court, because General Counsel would not agree that Charging Party should not be given access to the documents. While I and the District Court again rejected these contentions by Respondents, I again find their position to be debatable and not frivolous.

So, in sum I do not believe that the mere fact that Respondents called no witnesses is sufficient, as Charging Party contends, to establish a frivolous defense. I conclude that Respondents did raisersome legitimate contentions with respect to General Counsel's case, and although I have rejected most of Respondents' arguments,[36] I find that their positions were debatable and not frivolous, and do not warrant the imposition of the extraordinary remedy of attorney's fees. *Heck's supra, National Roof Systems,* 305 NLRB #147 (1991), *Workroom supra*; *Super Save supra; Park Inn supra.* See also *G.T. Knight Co.* 268 NLRB 469 (1983), and *Rosehill Cemetery Assn.* 281 NLRB 425, 426 fn. 5(1986), where even in summary judgment cases, where no litigable issues had been raised, the Board did not order the payment of attorney's fees, although it was requested to do so.

The cases cited by Charging Party in support of its request, *Tidee supra, Texas Super supra, Autoprod supra,* are

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[36] I would note that I have dismissed a few of the complaint allegations for various reasons, including the failure to establish supervisory or agency status.

not dispositive, since they all involve clearly frivolous defenses which had been previously decided or were similar and directly related to the unfair labor practices found in a long history of prior violations against the same Respondent.

C.F. Eckert, Inc. 301 NLRB #120 (1991) is more persuasive, but is still in my view distinguishable and not controlling here. While the Board did rely in part on the fact that the Respondent in *Eckert supra* presented no defense to the complaint, the nature of the case and Respondent's conduct, therein were quite different from the instant matter. Thus, *Eckert* involved a clear cut and rather routine case of refusal to make payments into the Union's funds. The Respondent there initially signed a settlement agreement, but then refused to comply, compelling the revocation of the agreement and the new complaint. The Board emphasized the Respondent's failure to comply with the settlement, as well as its failure to present any evidence, or even cross-examine any witnesses during the trial. Thus, it is obvious the Board was convinced that the Respondent therein knew that it had no debatable or legitimate defense to the allegations of a clear cut and rather simple case.

These facts are not present in the instant matter, as I have concluded that Respondents vigorously cross-examined all witnesses, raised credibility problems, and did introduce some evidence through General Counsel's witnesses, all contributing to a number of issues that were far from clear cut, and some quite questionable. Therefore, I find *Eckert supra* to be distinguishable, and shall not recommend the awarding of attorney's fees to Charging Party.

Charging Party also requests the reimbursement of organizing expenses to it, citing *J.P. Stevens supra* and *Autoprod supra.* Charging Party argues that since Respondents have been found to be a single employer with and alter ego of Southland-Metro, this demonstrates the behavior and continuous flouting of Board and Court Orders, found in *J.P. Stevens* to be sufficient to warrant such a remedy.

Ordinarily, organizational expenses, like attorney's are awarded by the Board only where the Respondents have engaged in frivolous litigation. *Heck's supra* at 766; *Wellman Industries, Inc.* 248 NLRB 325 (1980).

However, in exceptional expenses, such as *J.P. Stevens supra*, where a long history of flagrant disregard of prior Board and Court Orders are present, such an award has been granted. Since I have already concluded that Respondents did not engage in frivolous litigation, it must be decided whether the facts here fit within the *J.P. Stevens* rationale.

I agree with Charging Party that Respondents have committed flagrant and serious violations here, and that some of them are similar to the violations found in the prior case. However, I do not believe that either the conduct here or the frequency of the violations, approaches the record of *J.P. Stevens supra,* which warranted such a remedy. Since even flagrant violations as here do not justify the imposition of a remedy of organizing expense, *Workroom supra* at 374, one prior case involving similar violations, nearly 20 years ago, is not sufficient to bring this case under the precedent

established in *J.P. Stevens supra.* See *Edwin R. O'Neill* 288 NLRB 1394 (1988), where prior violations by an employer alter ego were insufficient to justify extraordinary remedies, including expenses.

Charging Party also requests that Beirel Jacobowitz be personally ordered to read the notice to employees, *Texas Foods supra, United Diary Farmers' Corp.* 242 NLRB 1026, 1029 (1979), as well as the invocation of the Board's special mail and publishing remedies. *Texas Foods supra, Monfort of Colorado* 284 NLRB 1429 (1987).

The Board, supported by the Courts, have ordered such remedies, where the conduct of the employers involved was so flagrant and pervasive, that they are likely to have a continuing coercive effect on the free exercise employees of their Section 7 rights, virtually foreclosing the possibility of holding a fair election. *Monfort of Colorado, Inc.* 298 NLRB 73, 86 (1991); *Workroom supra* 274 NLRB at 841; *Monfort of Colorado, Inc.* 284 NLRB 1429 , 1430 (1987) 852 F.2d 1344, 1347-1349 (D.C. Cir. 1988); *United Supermarkets, Inc.* 261 NLRB 1291, 1293 (1982), *The Loray Corp.* 189 NLRB 557, 558-5559 (1970); *Haddon House Foods* 242 NLRB 1057, 1058-1059 (1990), *affd. in pertinent part.* 640 F2d. 392, 399-404 (D.C. Cir. 1981); *NLRB v. S. E. Nichols, Inc.* 862 F.2d 952, 962 (2nd Cir. 1988); *NLRB v. Unional Nacional die Trabajadores* 540 F2d 1, 12 (1st Cir. 1976), *Gourmet Foods, Inc.* 270 NLRB 578, 587 (1984).

I agree with Charging Party that Respondents here have committed flagrant and extensive unfair labor practices, so that the mere posting of a notice will not be

sufficient to make the employees individually aware of their statutory rights to select a union of their own choosing. *Loray supra* at 558; *Monfort supra* 289 NLRB at 1429-30.

Here, Respondent's have discriminatorily laid off or discharged five unit employees, including a leading adherent of the ILG, Carmen Nieves. Respondents' conduct with respect to Nieves was particularly reprehensible, inasmuch as it included a barrage of obscenities plus physically blocking her from leaving the office at the time of her discharge, by David and Beirel Jacobowitz their two highest officials.

Similarly, when Respondents terminated Bella Martinez, Respondents by Beirel also subjected her to humiliating insults (referring to cockroaches and insects), plus a physical assault by removing her chair from under her and pushing her.

Additionally, after unlawfully terminating Rosita Chalston on two occasions, and being forced to reinstate her after an arbitration, Respondents continued to discriminate against her in several ways, including the almost inhuman practice of a supervisor clapping his hands whenever she looked up from her work.

Additionally, I would note that most of the 8(a)(1) statements, including threats of discharge and plant closure were made by Beirel. Beirel was also personally involved in the disgraceful conduct detailed above at the time of the discharges of Nieves and Martinez, as well as the constructive discharge of Galarza. Thus, I conclude that the

mere posting of a notice by Respondents will not be sufficient to make employees individually aware of his statutory rights and that his exercise of such rights will be respected by Respondents.

Accordingly, it is recommended that in addition to posting copies of the notice, that Beirel Jacobowitz, Respondents' chief executive, who was responsible for and directly implicated in most of the violations found, be ordered to personally sign the notices, and to personally read the attached notice at assembled meetings in which all employees will be reached, "directly placing on the notice the imprimatur of the person most responsible for the illegal acts in question," *Loray supra* and that since Respondents "unlawful campaign emanated from the top; so too must reassurances that this company campaign will end come from the top." *United Dairy supra* at 1029. See also *Haddon House supra* at 1058; *United Supermarkets supra* at 1294.

It is also appropriate to order Respondents to sign and mail copies of the Notice to all their present employees as well as to all employees on their payroll since Respondents began their course of unlawful conduct in November of 1989. *United Supermarkets supra* at 1294, *Workroom supra* 274 NLRB at 841; *Loray supra* at 558; *United Dairy supra* at 1029, *Monfort supra* 248 NLRB 86, 88.

I also find that it is appropriate to order Respondents to publish a copy of the notice in two local newspapers of

general circulation, including "El Diario,"[67] twice weekly for a period of 4 weeks. *Monfort supra* 298 NLRB at 88; *Monfort supra* 284 NLRB 1429, 1479; *United Dairy supra* at 1029; *Haddon House supra* at 1058.

Charging Party also requests a number of other special remedies providing for reasonable access to Respondents' premises and bulletin boards by the ILG in certain situations, plus supplying the ILG with names and addresses of their current employees. These remedies are traditionally provided by the Board, where as here, Respondents have engaged in flagrant and pervasive conduct rendering the possibility of fair election remote, and I find it appropriate to so recommend. *Monfort supra* 298 NLRB at 86 *United Dairy supra* at 1031 *United Supermarkets supra* at 1293; *Haddon House supra* at 1058-59. These access provisions which I shall recommend shall apply for a period of 2 years from the posting of the notice, or until the Regional Director has issued an appropriate certification following a free and fair election, whichever comes first. *Monfort supra, Haddon House supra.*

Finally, since I found flagrant unfair labor practices to have been committed by Respondents, a broad cease and desist order is required. *Hickmott Food* 242 NLRB 1357 (1979).

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[67] I note that a substantial number of employees of Respondents are Spanish speaking, and the record establishes that some of them saw Respondents' ads in that newspaper.

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Decision of the National Labor Relations Board and Order

Upon the foregoing findings of fact and conclusions of law and upon the record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[38]

The Respondents, Three Sisters Sportswear Co., Bedford Cutting Mills, Inc., Three Sisters Apparel Corp., Metropolitan Sweater Industries, Inc., United Knitwear Industries, Inc., United Knitwear Industries Ltd., Skylight Fashions, Inc., d/b/a Skylight Trading and 144 Spencer Realty Corp., their officers, agents, successors, and assigns, shall jointly and severally:

1. Cease and desist from:

(a) Laying off, discharging, issuing written warnings to or otherwise discriminating against any employee because of their support for or activities on behalf of the International Ladies' Garment Workers' Union, AFL-CIO, herein called the ILG, or because a charge has been filed on behalf of their employees with the National Labor Relations Board.

(b) Verbally abusing, physically assaulting, blocking employees from exiting their office, isolating the work stations of employees, instructing their mechanics not to fix machines of employees on request, making more

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[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

complicated and fewer assignments to employees, forcing employees to wait longer for assignments than other employees, supervising employees more closely, instructing employees not to speak with other employees, reducing the bonus or the pay of employees, or having their supervisors clapping their hands whenever an employee looks up from their work, because of their employees support for or activities on behalf of the ILG, or because they engaged in other protected concerted activity, or because a charge has been filed on behalf of their employees at the National Labor Relations Board.

(c) Ordering and instructing employees not to accept and to rip up literature from the ILG, referring to the ILG as the MAFIA, promising employees benefits to assist them in soliciting support for Local 17-18 from other employees, threatening employees with discharge or closing of the factory if said employees support the ILG or if the ILG came into the factory, threatening employees with unspecified reprisals if they speak to employees who support the ILG, questioning employees concerning their activities on behalf of or support for the ILG, or creating the impression among their employees that their activities or the activities of their fellow employees on behalf of the ILG were under surveillance by Respondents.

(d) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

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(a) Offer Israel Galarza, and Silvia Silverio immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Galarza, Silverio, Carmen Nieves, Bella Martinez, and Rosita Chalston for any loss of earnings and other benefits suffered as a result of the discrimination against them, including the reduction of work opportunities for Nieves and the reduction of Galarza's pay and bonus, in the manner set forth in the remedy section of this decision.

(c) Remove from their files any references to the unlawful actions taken against Silverio, Nieves, Chalston, Martinez and Galarza, and notify the employees in writing that this has been done and that the actions will not be used against them in any way.

(d) Restore the pay of Israel Galarza to what it had been prior to its reduction in March of 1991, plus any raises which he would have received since that time.

(e) Rescind in writing the instruction that their employees are no longer allowed to speak with Carmen Nieves, and the instructions that her machine will not be fixed by the mechanic at her request, notify Nieves in writing that this has been done, and distribute a copy of this notice of recission to all employees.

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(f) Restore the work station of Nieves to what it had been prior to her termination on November 19, 1989.

(g) Restore their practice which had been in effect prior to November 19, 1989, of assigning Nieves to an amount of bundles equal to that of other employees.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Mail copies of the attached notice marked "Appendix"[»] on forms provided by the Regional Director for Region 29, after being signed by Beirel Jacobowitz, Respondents' chief operating official, to each and every employee working at its Brooklyn, New York plant on the date on which such notice is mailed, as well as to each and every employee who worked or should have worked in its plant during the period of the Respondent's unfair labor practices. Additional copies of the notice shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that

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» If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the notices are not altered, defaced, or covered by any other material.

(j) Mail and post in the same manner as described above a Spanish-language translation of the English-language notice. The Regional Director for Region 29 of the Board will provide copies of the Spanish language-translation for posting by the Respondent.

(k) Publish in two newspapers of general circulation including El Diario, copies of the attached notice marked "Appendix". Such notice shall be published twice weekly for a period of 4 weeks.

(l) Convene during working time all employees at the Brooklyn plant, by shifts, departments, or otherwise, and have Beirel Jacobowitz, read to the assembled employees the contents of the attached notice marked "Appendix." The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice.

(m) On request of the ILG made within 1 year of the issuance of the Order here, make available to the ILG without delay a list of names and addresses of all employees at the time of the request.

(n) Immediately on request of the ILG, for a period of 2 years from the date on which the aforesaid notice is posted or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, grant the ILG and its representatives reasonable access to

the Brooklyn, New York plant bulletin boards and all places where notices to employees are customarily posted.

(o) Immediately on request of the ILG, for a period of 2 years from the date on which the aforesaid notice is posted or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, permit a reasonable number of union representatives access for reasonable periods of time to non-work areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within its Brooklyn, New York plant so that the ILG may present its views on unionization to the employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other non-work periods.

(p) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, any supervisor or agent of Respondents convenes any group of employees at the Respondents' Brooklyn plant and addresses them on the question of union representation, give the ILG reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities to address the employees on the question of union representation.

(q) In any election which the Board may schedule at the Respondent's Brooklyn plant within a period of 2 years following the date on which the aforesaid notice is posted and in which the ILG is a participant, permit, on request by the ILG, at least two union representatives reasonable access to the plant

and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days but not less than 48 hours prior to any such election.

(r) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ORDERED that the Complaint is dismissed as to allegations not specifically found herein.

IT IS FURTHER ORDERED that the Complaint in Case 29-CB-7505 against Local 17-18 United Production Workers' Union, AFL-CIO is hereby dismissed.

DATED: Washington, DC January 15, 1993

STEVEN B. FISH
ADMINISTRATIVE LAW JUDGE

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT layoff, discharge, issue written warnings to or otherwise discriminate against our employees because of their support for or activities on behalf of the International Ladies' Garment Workers' Union, AFL-CIO, herein called the ILG, or because our employees engaged in other protected concerted activity, or because a charge has been filed on behalf of our employees with the National Labor Relations Board.

WE WILL NOT verbally abuse, physically assault, block our employees from exiting our office, isolate the work stations of our employees, instruct our mechanics not to fix machines of our employees on request, make more complicated and fewer assignments to our employees, forcing our employees to wait longer for assignments than other employees, supervise our employees more closely, instruct our employees not to speak with other employees, reduce the bonus or the pay of our employees, or have our supervisor clap their hands whenever an employee looks up from their work, because of our employees support for activities on behalf of the ILG, or because they engaged in other protected concerted activity, or because a

charge has been filed on behalf of our employees at the National Labor Relations Board.

WE WILL NOT order and instruct our employees not to accept and to rip up literature from the ILG, refer to the ILG as the MAFIA, promise our employees benefits to assist us in soliciting support for Local 17-18 from other employees, threaten our employees with discharge or closing of the factory if said employees support the ILG or if the ILG comes into the factory, threaten our employees with unspecified reprisals if they speak to employees who support the ILG, question our employees convening their activities on behalf of or support for the ILG, or create the impression among our employees that their activities or the activities of their fellow employees on behalf of the ILG were under surveillance by us.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Israel Galarza, and Silvia Silverio immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Galarza, Silverio, Carmen Nieves, Bella Martinez, and Rosita Chalston for any loss of earnings and other benefits, suffered as a result of the discrimination against them, including the reduction of work opportunities for Nieves and the reduction of Galarza's pay and bonus.

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WE WILL remove from our files any references to our unlawful actions taken against Silverio, Nieves, Chalston, Martinez and Galarza, and notify the employees in writing that this has been done and that the actions will not be used against them in any way.

WE WILL restore the pay of Israel Galarza to what it had been prior to its reduction in March of 1991, plus any raises which he would have received since that time.

WE WILL rescind in writing the instruction that our employees are no longer allowed to speak with Carmen Nieves, and out instructions that her machine will not be fixed by the mechanic at her request, notify Nieves in writing that this has been done, and distribute a copy of this notice of recession to all employees.

WE WILL restore the work station of Nieves to what it had been prior to her termination on November 19, 1989.

WE WILL restore our practice which had been in effect prior to November 19, 1989, of assigning Nieves to an amount of bundles equal to that of other employees.

WE WILL mail copies of this notice signed by Beirel Jacobowitz, our Chief Operating official, to every employee working at our plant on the date on which such notice is mailed, as well as to each and every employee who worked or should have worked in our plant since November of 1989.

WE WILL publish in local newspapers of general circulation including El Diario copies of the attached notice

marked "Appendix." Such notice shall be published twice weekly for a period of 4 weeks.

WE WILL convene during working time all employees, at the plant, by shifts, departments, or otherwise, and have Beirel Jacobowitz read to the assembled employees the contents of this notice. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice.

WE WILL on request of the ILG made within 1 year of the issuance of the Order here, make available to the ILG without delay a list of names and addresses of all employees at the time of the request.

WE WILL immediately on request of the ILG for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, permit a reasonable number of union representatives access for reasonable periods of time to non-work areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within our plant so that the ILG may present its views on unionization to our employees orally and in writing, in such areas during changes of shift, breaks, mealtimes or other non-work periods.

WE WILL in the event that during a period of 2 years following the date on which the aforesaid notice is posted, or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, any supervisor or agent of ours convenes any group of employees at the Brooklyn, New York plant and addresses them on the

question of union representation, give the ILG reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities to address the employees on the question of union representation.

WE WILL in any election which the Board may schedule at the Brooklyn, New York plant within a period of 2 years following the date on which the aforesaid notice is posted and in which the ILG is a participant, permit, on request by the ILG at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days but not less than 48 hours prior to any such election.

THREE SISTERS SPORTSWEAR CO.,
BEDFORD CUTTING MILLS, INC.,
THREE SISTERS APPAREL CORP.,
METROPOLITAN SWEATER
INDUSTRIES, INC.,
UNITED KNITWEAR INDUSTRIES, INC.,
UNITED KNITWEAR INDUSTRIES,
LTD., SKYLIGHT FASHIONS, INC. d/b/a
SKYLIGHT TRADING AND 144
SPENCER REALTY CORP.

_____
(Employer)

Dated _____ By _____
(Representative, Title)

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This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 29, 75 Clinton Street, Brooklyn, New York 11241. Telephone No. 718-330-7713.

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Three Sisters Sportswear Co.; Bedford Cutting Mills, Inc.; Three Sisters Apparel Corp.; Metropolitan Sweater Industries, Inc.; United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.; Skylight Fashions, Inc., d/b/a Skylight Trading and 144 Spencer Realty Corp. and International Ladies' Garment Workers' Union, AFL-CIO and Local 17-18, United Production Workers' Union[1], Party In Interest

Local 17-18, United Production workers' union, AFL-CIO (Three Sisters Sportswear Co., Bedford Cutting Mills, Inc.Three Sisters Apparel Corp.; Metropolitan Sweater Industries, Inc.;United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.;Skylight Fashions, Inc., d/b/a Skylight Trading and 144 Spencer Realty Corp.) *and* International Ladies' Garment Workers' Union, AFL-CIO. Case Nos. 29-CA-14046, 29-CA-1495, 29-CA-14517, 29-CA-14518, 29-CA-14535, 29-CA-14617, 29-CA-14625, 29-CA-14758, 29-CA-15095, 29-CA-15646, 29-CA-15653, 29-CA-15720, 29-CA-15740, 29-CB-7505

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 15, 1993. Administrative Law Judge Steven B. Fish issued the attached decision. The Repondent-Companies filed exceptions and a supporting brief, and the Gneneral Counsel filed a brief.

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1 The name of the Party in Interest is corrected to read as alleged in the complaint.

Supplemental Appendix A
Decision of the National Labor Relations Board and Order

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

1. The Respondent-Companies have excepted to the judge's findings that the named Respondent-Companies are a single employer and alter egos of each other. We agree with the judge's findings for the reasons set forth in his decision.[4] See *Imco/International Measurement, Co.*, 304 NLRB 738 (1991), enfd. 978 F.2d 334 (7th Cir. 1992). We also agree with the judge's findings that the Respondent-Companies violated Section 8(a)(3) and (1) of the Act by the discriminatory treatment of Carmen Nieves, Bella Martinez, Israel Galarza, Rosita Chalston[5] and Silvia Silverio.

2. The Respondent-Companies have excepted to the judge's recommendation that special access remedies be provided to the International Ladies' Garment Workers' Union, AFL-CIO. We agree with the judge that these remedies are appropriate and

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2 The Respondent-Companies have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). entd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

3 No exceptions were filed with respect to the independant 8(a)(1) and (2) findings. In addition, no exceptions were filed with respect to the judge's dismissal of the 8(b)(1)(A) complaint allegations.

4 We note that the parties stipulated that Three Sisters Sportswear Co. and Three Sisters Apparel Corp. are the same company and that United Knitwear Industries, Inc. and United Knitwear, Ltd. are the same company.

Member Raudabaugh agrees that the Respondents constitute a single employer. He does not pass on the judge's additional conclusion that they are alter egos of each other.

5 No exceptions were filed with respect to the findings regarding Chalston.

necessary to dissipate the effects of the Respondent-Companies' flagrant and extensive unfair labor practices.[6] See *S. E. Nichols, Inc.* 284 NLRB 556 (1987), enfd. in relevant part 862 F.2d 952 F2d Cir. 1988).

3. The Respondent-Companies have excepted to the judges's recommendation that Beirel Jacobowitz be required to read the notice to assembled employees. We agree with the judge to the extent that Beirel Jacobowitz be ordered to sign the notice and be present while the notice is read. We shall, however, modify the reccomended Order to provide that Beirel Jacobowitz, at his option, either read the notice or be present while the notice is read by a Board agent. In requiring Beirel Jacobowitz to personally read the notice or be present while is read, we emphasise that Beirel Jacobowitz personally committed the majority of the 8(a)(1) violations and personally engaged in the discriminatory treatment of four of the five discriminatees. In view of his pervasive personal involvement in serious unfair labor practices, we conclude that his reading of the notice or his presence while it is read is necessary to dispel the atmosphere of intimidation he created. *Monfort of Colorado*, 284 NLRB 1429 (1987), enfd. sub nom. *Commercial Workers v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988). In providing that Beirel Jacobowitz may elect to have the notice read by a Board agent rather than to read it himself, we are mindful of the Second Circuit's decision in *S. E. Nichols, supra*, modifying the Board's Order that the company president personally read the notice by alternatively providing that the notice may be read by a Board agent.

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6 We shall correct the judge's inadvertent omission from the notice to employees of the requirement that the Respondent-Companies provide access by the International Ladies' Garment Workers' Union to the plant's bulletin boards and other places where notices are kept.

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4. Finally, as a substantial number of the Respondent-Companies employees are primarily Spanish Speaking[7] we shall modify the recommended Order to make clear that the notice to employees be posted, mailed, published and read in Spanish, as well as in English.[8]

The judge recommended that the Respondent-Companies be ordered to publish the notice in two newspapers of general circulation, including *El Diario*, a Spanish publication. We shall modify the recommended order to probide that the notice be published in *El Diario* in Spanish and in another newspaper of general circulation in English. We shall also modify the recommended Order to require the Respondent-Companies to afford the Board a reasonable opportunity to provide a Board agent to read the notice, if Beirel Jacobowitz chooses not to do so, and to provide for an interpreter to read the notice in Spanish.

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7 All 10 employees who testified at the hearing did so with the help of an interpreter.

8 The judge provided that the notice shiuld be posted and mailed in Spanish and English.

Supplemental Appendix A
Decision of the National Labor Relations Board and Order

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent-Companies, Three Sisters Sportswear Co.; Bedford Cutting Mills, Inc.; Three Sisters Apparel Corp.; Metropolitan Sweater Industries, Inc.; United Knitwear Industries, Inc.; United Knitwear Industries, Ltd.; Skylight Fashions, Inc., d/b/a Skylight Trading and 144 Spencer Realty Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

1. Substitute the following for paragraph 2(k).

"(k) Publish in two newspapers of general circulation sopies of the attached notice marked 'Appendix.' The notice shall be published twice weekly for a period of 4 weeks. One of the newspapers shall be *El Diario*; the Spanish translation of the notice shall be published in the other newspaper."

2. Substitute the following for paragraph 2(I).

"(I) Convene during working time all employees at the Brooklyn plant, by shifts, departments, or otherwise, and have Beirel Jacobowitz read to the assembled employees the contents of the attached notice marked 'Appendix,' or at Beirel Jacobowitz' option, permit a Board agent to read the notice. If Beirel Jacobowitz chooses to have a Board agent read the notice he shall be present while the Spanish transation of the notice is read to assembled employees by a Board agent or by a Board provided intrepreter. The Board shall be afforded a reasonable opportunity to provide for the presence of a Board agent and an interpreter at any assembly called for the purpose of reading the notice."

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3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 1993

_____
James M. Stephens, Chairman

_____
Dennis M. Devaney, Member

_____
John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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Decision of the National Labor Relations Board and Order

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT layoff, discharge, issue written warnings to or otherwise discriminate against our employees because of their support for or activities on behalf of the International Ladies' Garment Workers' Union, AFL-CIO, herein called the ILG, or because our employees engaged in other protected concerted activity, or because a charge has been filed on behalf of our employees with the National Labor Relations Board.

WE WILL NOT verbally abuse, physically assault, block our employees from exiting our office, isolate the work stations of our employees, instruct our mechanics not to fix machines of our employees on request, make more complicated and fewer assignments to our employees, forcing our employees to wait longer for assignments than other employees, supervise our employees more closely, instruct our employees not to speak with other employees, reduce the bonus or the pay of our employees, or have our supervisor clap their hands whenever an employee looks up from their work, because of our employees support for activities on behalf of the ILG, or because they engaged in other protected concerted activity, or because a

charge has been filed on behalf of our employees at the National Labor Relations Board.

WE WILL NOT order and instruct our employees not to accept and to rip up literature from the ILG, refer to the ILG as the MAFIA, promise our employees benefits to assist us in soliciting support for Local 17-18 from other employees, threaten our employees with discharge or closing of the factory if said employees support the ILG or if the ILG comes into the factory, threaten our employees with unspecified reprisals if they speak to employees who support the ILG, question our employees convening their activities on behalf of or support for the ILG, or create the impression among our employees that their activities or the activities of their fellow employees on behalf of the ILG were under surveillance by us.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Israel Galarza, and Silvia Silverio immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Galarza, Silverio, Carmen Nieves, Bella Martinez, and Rosita Chalston for any loss of earnings and other benefits, suffered as a result of the discrimination against them, including the reduction of work opportunities for Nieves and the reduction of Galarza's pay and bonus.

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WE WILL remove from our files any references to our unlawful actions taken against Silverio, Nieves, Chalston, Martinez and Galarza, and notify the employees in writing that this has been done and that the actions will not be used against them in any way.

WE WILL restore the pay of Israel Galarza to what it had been prior to its reduction in March of 1991, plus any raises which he would have received since that time.

WE WILL rescind in writing the instruction that our employees are no longer allowed to speak with Carmen Nieves, and out instructions that her machine will not be fixed by the mechanic at her request, notify Nieves in writing that this has been done, and distribute a copy of this notice of recession to all employees.

WE WILL restore the work station of Nieves to what it had been prior to her termination on November 19, 1989.

WE WILL restore our practice which had been in effect prior to November 19, 1989, of assigning Nieves to an amount of bundles equal to that of other employees.

WE WILL mail copies of this notice signed by Beirel Jacobowitz, our Chief Operating official, to every employee working at our plant on the date on which such notice is mailed, as well as to each and every employee who worked or should have worked in our plant since November of 1989.

WE WILL publish in local newspapers of general circulation including El Diario copies of the attached notice

marked "Appendix." Such notice shall be published twice weekly for a period of 4 weeks.

WE WILL convene during working time all employees, at the plant, by shifts, departments, or otherwise, and have Beirel Jacobowitz read to the assembled employees the contents of this notice. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice.

WE WILL on request of the ILG made within 1 year of the issuance of the Order here, make available to the ILG without delay a list of names and addresses of all employees at the time of the request.

WE WILL immediately on request of the ILG for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, permit a reasonable number of union representatives access for reasonable periods of time to non-work areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within our plant so that the ILG may present its views on unionization to our employees orally and in writing, in such areas during changes of shift, breaks, mealtimes or other non-work periods.

WE WILL in the event that during a period of 2 years following the date on which the aforesaid notice is posted, or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, any supervisor or agent of ours convenes any group of employees at the Brooklyn, New York plant and addresses them on the

question of union representation, give the ILG reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities to address the employees on the question of union representation.

WE WILL in any election which the Board may schedule at the Brooklyn, New York plant within a period of 2 years following the date on which the aforesaid notice is posted and in which the ILG is a participant, permit, on request by the ILG at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days but not less than 48 hours prior to any such election.

THREE SISTERS SPORTSWEAR CO.,
BEDFORD CUTTING MILLS, INC.,
THREE SISTERS APPAREL CORP.,
METROPOLITAN SWEATER INDUSTRIES,
INC., UNITED KNITWEAR INDUSTRIES,
INC., UNITED KNITWEAR INDUSTRIES,
LTD., SKYLIGHT FASHIONS, INC. d/b/a
SKYLIGHT TRADING AND 144 SPENCER
REALTY CORP.

No. 95-641

(3)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC. d/b/a SKYLIGHT TRADING and 144 SPENCER REALTY CORP.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

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QUESTIONS PRESENTED

1. Does the Board abuse its broad remedial authority by fashioning union access rights onto private employer property to remedy repeated episodes of flagrant unfair labor practices at that facility?

2. Is the Board obligated to set forth a special rationale to support union access rights when episodes of serious unfair labor practices are separated by only eight (8) years?

3. In the context of the garment industry, is each alter ego corporate entity which forms a single integrated enterprise within the reach of the Board's powers to remedy the enterprise's unfair labor practices?

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No. 95-641

In The

Supreme Court of the United States

October Term, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, NC. d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

Respondent International Ladies' Garment Workers Union, AFL-CIO ("ILG")[1] opposes the petition for a writ of certiorari submitted by Petitioner ("Employer") in this case. It is noteworthy that the United States Court of Appeals for the District of Columbia Circuit rejected these same baseless assertions without opinion only days after oral argument. It is respectfully contended that there is so little likelihood of this petition being granted that it is frivolous, and that it is only intended to further delay the inevitable point when this rogue employer will be called to account for the flagrant and abusive unfair labor practices to which it subjected its employees.[2]

STATEMENT OF THE CASE

Petitioners raise three questions for review. The first two questions expressly challenge the Board's remedial authority, even in the face of repeated flagrant unfair labor practices, to order effective relief which includes limited ILG access rights to the Employer's premises for the purpose of conducting a union organizing campaign. The third question presumes that the Board cannot include a corporation it has found to be both an alter ego and a component of a single integrated enterprise within the scope of its remedial orders, unless such corporation is shown to have exercised joint control over the labor relations of the direct corporate employer.

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1. The ILG was an intervenor below. It is now known as the Union of Needletrades, Industrial and Textile Employees ("UNITE").

2. The patent frivolity of this petition warrants an award of damages and double costs under Supreme Court Rule 42.2, formerly Rule 49.2. *See In re Amendment to Rule 39*, 500 U.S. 13 (1991); *Hatch v. Reliance Insurance Co.*, 474 U.S. 1048 (1986); *Hyde v. Van Wormer*, 474 U.S. 992 (1985). No effort was made to establish any of the reasons for granting a petition which are identified in Rule 10. The petition blatantly misrepresents critical facts concerning the ability of these employees to receive union literature at the workplace and misconstrues the relevant precedents. Though this conduct may be excusable from a *pro se* litigant, it is unacceptable from a member of this Bar.

The petition does not contest the Board's findings that Petitioners:

- ordered and instructed employees not to accept and to rip up literature from the ILG (SA 96);[3]
- promised employees benefits to assist the Petitioner in sponsoring a sweetheart union alternative to ILG (SA 96);
- threatened workers with discharge and factory closure if they supported the ILG (SA 96-97);
- threatened employees with unspecified reprisals if they spoke to employees who supported the ILG (SA 97);
- interrogated employees concerning their activities and support for the ILG (SA 97);
- created the impression among employees that activities on behalf of the ILG were under surveillance (SA 97);
- discharged Carmen Nieves, Bella Martinez, Israel Galarza, Silvia Silverio and Rosita Chalston because of their support for the ILG (SA 97-98);
- verbally abused, physically assaulted and harassed because of their ILG activities (SA 97-98).

This striking series of egregious unfair labor practices is matched point for point by Petitioners' conduct in a prior corporate form known as Southland-Metro. The Board's

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3. References to the Appendix will be denoted "A." References to the Supplemental Appendix will be denoted "SA."

decision finding that Southland-Metro made many of the exact same threats and unlawfully discharged 88 employees because of their support for the ILG is reported at 260 NLRB 642 (1982).

Petitioners' Questions concerning the Board's remedial authority are thus raised in a context of viciously anti-union conduct which the ALJ and the Board have expressly found cannot be remedied through backpay, recall and "the mere posting of a notice" which informs employees of their rights under the law (SA 107-108; A 2).

I. Relevant Factual Summary

A. The Pre-1988 Conduct

In 1980, the ILG began an organizational campaign at Southland Knitwear Inc., which was a part of an integrated group of corporations including Metropolitan Industries, Inc. *Southland Knitwear Inc.*, 260 NLRB 642 (1982). In response, the owners of Southland- Metro, including Jack, David and Beirel Jacobowitz, discharged 88 ILG supporters, threatened plant closure if the employees supported the ILG, and in various ways interfered with ILG organizational activity and campaigning. The Board concluded that Southland-Metro had committed "egregious and widespread unfair labor practices" (SA 6-7). These unfair labor practices (and the prospect of the backpay owed to 88 discriminatees) apparently caused the Jacobowitz family which owned Southland-Metro to create other corporate entities with which to conduct its sportswear manufacturing business. The ALJ found and Petitioner does not here deny that Three Sisters and the other corporations "are simply a continuation of the Southland-Metro business operations" created in "nothing more than an obvious attempt to insulate Three Sisters from liability for Southland-Metro's unfair labor practices" (SA 29).

B. The 1988 Campaign

At the time of the 1988 campaign, the Petitioners again resorted to coercive and unlawful conduct intended to deprive their employees of the right to freely select their bargaining agent. In pertinent part, the ALJ found and the Board agreed that Petitioners committed unfair labor practices so flagrant and extensive that the mere "posting of a notice would not be sufficient" as a remedy (SA 107-108). Petitioners discriminatorily terminated five unit employees who were known ILG supporters. The discharge of ILG adherent Carmen Nieves occurred "in a particularly reprehensible" fashion involving a "barrage of obscenities" and physical detention by Petitioners' two highest officials (SA 108). Discriminatee Bella Martinez was also subject to humiliating insults during her unlawful termination, with Beirel Jacobowitz calling union supporters "cockroaches and insects" and physically assaulting Ms. Martinez by pushing her from her chair (SA 108). Discriminatee Rosita Chalston was subject as well to what the ALJ deemed "the almost inhuman practice" of forcing her to keep her head and eyes focused down throughout the workday lest she make eye contact with another worker (SA 108).

Petitioners' contention that special access remedies are unwarranted because ILG representatives "openly enlisted the support of Three Sisters employees and freely distributed leaflets and other literature to the employees on and near the plant's premises" is a flat-out misrepresentation, exceeded in its enormity only by the breath-takingly false statement that "Three Sisters principal, Beirel Jacobowitz, did nothing to hamper the ILG's distribution of ILG literature on the premises."[4] Petition at

4. Petitioners cite pp. 53-54 and 57-58 of the Court of Appeals Exhibit Volume in support of this factual assertion. In that portion of the record, Gloria Soto testifies that ILG representatives on the public sidewalk outside the plant handed out leaflets to employees as they left work, while Beirel Jacobowitz stood at the door observing.

5-6. The ALJ's opinion, which was adopted by the Board and enforced below, makes clear that Beirel Jacobowitz:

(1) instructed employees not to take ILG leaflets (SA 43, 65);

(2) instructed employees to rip up any ILG leaflets (SA 43);

(3) advised employees that he would shut down the plant and fire everyone because of the ILG organizers passing out leaflets outside the plant (SA 44);

(4) mentioned the "people outside" while physically attacking Bella Martinez, in what the ALJ concluded was an obvious reference to the ILG representatives distributing literature outside the plant (SA 68).

It is impossible to square this reprehensible record with the assertion in the petition that Beirel Jacobowitz "did nothing to hamper the ILG's distribution of ILG literature on the premises."

C. The Status of Spencer Realty

Petitioners contend that Spencer Realty should not have been deemed a "single employer" with the various sportswear manufacturing corporations because it had no employees of its own and did not exercise labor control over the employees of Three Sisters or Bedford. Of course, the ALJ found that Spencer Realty is "part of the single integrated enterprise with *and is an alter ego of* the other Petitioner corporations" (emphasis supplied) (SA 38). This alter ego finding (which Petitioners only barely contest as an afterthought at note 15 of their Petition) renders academic Petitioners' single-employer concerns because the remedies ordered by the Board apply to Spencer Realty as an alter ego of the direct employing corporations.

In any event, the record overwhelmingly demonstrates that both the alter ego and single-employer findings are appropriate. Spencer shares office space, clerical employees and accounting services with the other Petitioners. It had the same federal taxpayer ID number as the 1980 corporate entities involved in the Southland-Metro case. It is owned and managed by the same Jacobowitz family members who own and manage the other Petitioners. It had a less than arms-length business relationship with the other Petitioners which included a lack of leases for the Petitioners (as opposed to unrelated entities with which it did business), unexplained periods of rental reduction and/or rent being paid by Petitioners, and substantial unexplained and unrepaid loans from the other Petitioners to Spencer. Finally, the record demonstrates a commingling of records from the other Petitioners in the so-called Spencer files (SA 37). None of these conclusions are or could be challenged by Petitioners. They occur in a context in which Spencer's owners have been expressly adjudicated to have previously engaged in corporate manipulations solely for the purpose of frustrating the enforcement of the Board's 1982 Order in the Southland-Metro litigation. These facts compel the conclusion that these corporations were alter egos of one another and part and parcel of a single, integrated enterprise.

REASONS FOR DENYING THE WRIT

The three arguments Petitioners assert in support of their petition are contradicted by long-settled and uncontroversial legal principles, and are utterly unsubstantiated by the record. Contrary to Petitioners' assertion, the Board amply justified the union access remedies it ordered. Further, the extensive and flagrant unfair labor practices committed render inapposite the private property interests Petitioners articulate in reliance on this Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

Petitioners also argue that the Board exceeded its discretionary remedial authority because the unfair labor practices committed were insufficiently intimidating and coercive to warrant union access remedies. The record evidence of repeated unfair labor practices involving threats, discharges, other retaliation, and abusive and degrading conduct demonstrates that this assertion is meritless. This contention also ignores Congress' express delegation to the Board of the primary authority to craft the remedies it concludes are necessary to dissipate the impact of unlawful employer conduct.

Finally, Petitioners contend that the Board erred in finding that 144 Spencer Realty Corp. was part of their single integrated enterprise, because of the absence of common control by Spencer over the enterprise's labor relations. This argument is belied by the Board's finding that 144 Spencer Realty Corp. was both an alter ego of and a single employer with the other Petitioning entities, by the record itself, and by the context of the garment industry in which the enterprise conducts its business.

I.

THE UNION ACCESS REMEDIES THE BOARD TAILORED TO CURE THE EFFECTS OF PETITIONERS' FLAGRANTLY UNLAWFUL CONDUCT WERE WELL WITHIN ITS BROAD REMEDIAL AUTHORITY.

The access remedies fashioned by the Board to ameliorate the effects of Petitioners' egregious unfair labor practices were plainly within the wide scope of the agency's remedial authority. The Board adequately established that the effects of the outrageous unfair labor practices committed by Petitioners required limited rights of union access to the Employers' premises in order to ensure that these workers may freely exercise their Section 7 rights without fear of reprisal. 29 U.S.C. § 157.

As such, the Board did not abuse its broad discretionary remedial authority in ordering union access to Petitioners' facility.

The Board's remedial authority arises under Section 160(c) of the National Labor Relations Act, which permits the Board "to take such affirmative action . . . as will effectuate [its] policies." 29 U.S.C. § 160(c). This Court has recently held that this express Congressional edict vests the Board with "the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice." *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835, 839, 127 L. Ed. 2d 152 (1994). In that case, this Court reaffirmed its "consistent appraisal of the Board's remedial authority throughout its long history of administering the Act," restating its rule that the Board's remedial determinations "merit the greatest deference." *ABF Freight System, Inc.*, 114 S. Ct. at 839. The Court reiterated that the Board's remedial orders should stand unless they constituted a "patent attempt to achieve ends" other than effectuating the Act's policies. *ABF Freight System, Inc.*, 114 S. Ct. at 839, *quoting Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *see also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

Petitioners' contention that "no unique problems of union access were shown" in this case, and that therefore the union access remedies ordered were inappropriate, is simply wrong. Petitioners do not challenge the Board's finding that supervisors and managers of the companies repeatedly admonished the workers against taking ILG leaflets and actually ripped such leaflets out of the workers' hands and tore them up. Nor do they challenge the Board's findings that Petitioners threatened workers with discharge and threatened to close the plant if they supported the ILG, promised workers benefits in exchange for their support for a favored union, interrogated workers concerning their activities on behalf and in support of the ILG,

created the impression that the workers were under surveillance, and discharged, verbally abused, harassed, and physically assaulted ILG supporters in retaliation for their union activities. In the context of this plethora of unfair labor practices, union access remedies are manifestly necessary in order to dispel the intimidating and coercive effects of Petitioners' unlawful conduct and ensure that the union's views will be heard. *See, e.g., Conair Corp. v. NLRB,* 721 F.2d 1355, 1360-1366, 1384-1385 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1241 (1984) (upholding union access remedies where employer threatened plant closure, discharges, and economic reprisals, solicited grievances, and discriminated against unfair labor practice strikers); *Teamsters Local 115 v. NLRB,* 640 F.2d 392, 394, 399-404 (D.C. Cir.), *cert. denied,* 454 U.S. 827 (1981) (enforcing order of extraordinary remedies where employer promised benefits, threatened discharges, discriminatorily discharged and laid off workers, and withdrew reinstatement offer to strikers).[5]

It must also be remembered that the deplorable record of unfair labor practices at issue here is merely a recapitulation of identical unfair labor practices committed by Petitioners in a previous corporate manifestation. *See generally Southland Knitwear, Inc.,* 260 NLRB 642 (1982). In fact, the Board established that Petitioners' metamorphosis into their current

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5. Other Circuits have repeatedly approved similar remedies in order to dispel the effects of an employer's unfair labor practices. *See, e.g., Monfort, Inc. v. NLRB,* 965 F.2d 1538 (10th Cir. 1992); *NLRB v. S.E. Nichols, Inc.,* 862 F.2d 952 (2nd Cir. 1988), *cert. denied,* 490 U.S. 1108 (1989); *Haddon House Food Products, Inc. v. NLRB,* 764 F.2d 182 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986); *J.P. Stevens Co., Inc. v. NLRB,* 638 F.2d 676 (4th Cir. 1980); *United Dairy Farmers Cooperative Association v. NLRB,* 633 F.2d 1054 (3rd Cir. 1980); *J.P. Stevens Co. v. NLRB,* 612 F.2d 881 (4th Cir.), *cert. denied,* 449 U.S. 918 (1980); *NLRB v. J.P. Stevens & Co., Inc.,* 563 F.2d 8 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978). There is no doctrinal split in the Circuits as to the enforcement of Board Orders providing for union access remedies.

corporate guises was accomplished for the sole purpose of evading the remedies ordered by the Board in the *Southland Knitwear* case. The overall history here indicates that Petitioners engaged in one episode of egregious unfair labor practices, manipulated the corporate form in order to evade the Board's remedial authority, and then, in a new manifestation, committed an identical set of flagrant unfair labor practices. In this context, union access remedies are necessary if the ILG is to have any hope of communicating its message to this intransigent employer's workers.

Petitioners contend that this Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), requires an analysis of their "property interests" even in the face of the pervasive and flagrantly unlawful conduct described above. Settled law requires no such inquiry. On the contrary, Circuits addressing the issue have concluded that the employer's property interests discussed in *Babcock* are inapplicable in the context of a remedial order. *See NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989); *United Steelworkers of America v. NLRB*, 646 F.2d 616, 638-639 (D.C. Cir. 1981); *Teamsters Local 115*, 640 F.2d at 400.[6] In the context of

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6. Petitioners claim that *United Steelworkers of America v. NLRB* requires that the Board "balance" the necessity for union access remedies against the employer property interests as articulated in *Babcock*. On the contrary, in *United Steelworkers of America* the District of Columbia Circuit reiterated the irrelevance of asserted property interests in the face of repeated unfair labor practices. While that court found that the property interests articulated in *Babcock* might preclude access as a remedial measure if there were no unfair labor practices found, the court stated that:

> The hallmark principle in each . . . application[] of access as a remedial measure is the necessity to offset coercive effects caused by an employer's unlawful campaign. As those effects spread and become entrenched, so too may an access remedy. In this way,

(Cont'd)

Petitioners' repeated unlawful conduct, and their attempt to escape liability by manipulating the corporate form, their assertion of property rights can only be seen as a doctrinal smokescreen to again attempt to evade liability. There can be no doubt that union access remedies are necessary "to offset the direct consequences or effects" of Petitioners' patently unlawful discharges, threats, interrogations, surveillance, intimidation, verbal abuse, and physical assaults. *United Steelworkers of America,* 646 F.2d at 639. As the District of Columbia Circuit stated, "Having produced such effects, [Petitioners] cannot hide behind the protection of *Babcock* or private property rights." *United Steelworkers of America,* 646 F.2d at 639.

II.

NO SPECIAL RATIONALE WAS NEEDED TO JUSTIFY THE UNION ACCESS RIGHTS ORDERED TO REMEDY EPISODES OF EGREGIOUS UNFAIR LABOR PRACTICES SEPARATED BY ONLY EIGHT YEARS.

Petitioners contend that the Board abused its broad discretionary remedial authority by ordering union access remedies "despite" an eight year gap between their first and second spate of multiple, identical and egregious unfair labor practices. Any passage of time between Petitioners' unfair labor practices is both legally irrelevant and factually belied by Petitioners' unlawful conduct. Furthermore, Petitioners' various

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(Cont'd)

> grants of access are designed fully to effectuate the policies of the Act; access is ordered to remedy the effects of unlawful behavior and not to punish or deter an employer. It is clear that the principles of *Babcock* have no direct application in this setting. . . .

United Steelworkers of America, 646 F.2d at 638.

attempts to distinguish their reprehensible conduct from that of other employers subject to similar remedial orders are meritless.

Petitioners assert that the Board's refusal to specifically evaluate the impact of an eight year gap between the commission of unfair labor practices amounted to an abuse of the agency's discretionary remedial authority. This contention is particularly ironic, in that the unfair labor practices committed by Petitioners in 1980 in their *Southland Knitwear* corporate guise were unremedied for eight years precisely because Petitioners sought to evade the Board's order in that case by creating alter ego entities.[7]

Petitioners' contention that the "passage of time" between episodes of unlawful conduct must be considered before union access remedies are imposed is specious. The one case relied upon by Petitioners involved the imposition of union access remedies at far away locations in response to a "relatively minor" unfair labor practice committed by an employer which had committed serious infractions elsewhere. *United Steelworkers of America,* 646 F.2d at 624, 619-624. There, the District of Columbia Circuit ordered the Board to factually substantiate the need for company-wide access remedies, and set forth specific criteria for the Board's consideration. *United Steelworkers of America,* 646 F.2d at 639-640. This case, by contrast, involves union access remedies at one facility ordered to ameliorate the effects of repeated massive violations at that facility of Sections 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(4) of the National Labor Relations Act. The special criteria employed in cases which involve company-wide access remedies ordered in response to unfair labor practices committed at one facility are irrelevant.

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7. Furthermore, the Board found that in 1985 Petitioners instructed a worker not to engage in activities on behalf of the ILG and paid her to solicit support for a favored union. Therefore, their contention that they committed no unfair labor practices between 1980 and 1988 is erroneous (SA 43).

Petitioners' other attempts to distinguish their outrageous conduct from that of other employers subject to union access remedies are equally unavailing. Petitioners claim that the union access remedies ordered were inappropriate because they should be construed as a "first offender" as opposed to a "hardened recidivist." This argument fails because the critical inquiry in reviewing the Board's remedial orders is the effect of the employer's unfair labor practices on employees. *Teamsters Local 115*, 640 F.2d at 399. The length and frequency of the unlawful conduct is immaterial. *Teamsters Local 115*, 640 F.2d at 399 ("an employer who strikes the first blow hard enough may not need to strike another"). As such, the District of Columbia Circuit in *Teamsters Local 115* rejected the employer's contention that the imposition of union access and notice remedies on employers with a long history of recidivism constituted "a policy of indulgence toward first offenders." 640 F.2d at 399, n. 8. Furthermore, given the identical and egregious unfair labor practices committed by Petitioners in their *Southland Knitwear* corporate guise, their claim that they should be considered "first offenders" by virtue of their having manipulated the corporate form in an attempt to evade the Board's first remedial order against them is duplicitous.

Petitioners' other attempts to distinguish their flagrantly unlawful conduct from that warranting the imposition of union access remedies in the past are equally meritless, all turning on the mistaken proposition that it is some quality of the employer's conduct, rather than the effect of that conduct on the workers, which guides the analysis. *Cf. Teamsters Local 115*, 640 F.2d at 392. For example, Petitioners contend that their conduct does not warrant the imposition of extraordinary remedies because it did not involve violations affecting "massive numbers" of workers. Petition at 14. However, where, as here, there is no doubt that the unfair labor practices at issue are designed to intimidate and coerce an entire workforce, the size of that workforce is

immaterial. Petitioners' contention that its conduct does not warrant the imposition of extraordinary remedies because there was no "persistent pattern of direct involvement by top management" is simply ludicrous. Petition at 14. The Board has found that Beirel Jacobowitz, Petitioners' chief operating officer, manager, and supervisor, "personally committed" the majority of the violations of Section 8(a)(1) of the Act, and "personally engaged in the discriminatory treatment of four of the five" workers discharged, findings that Petitioners do not contest here (SA 126). Indeed, the Board found that Beirel Jacobowitz's "pervasive personal involvement in serious unfair labor practices" was such that he should be required to read the Board's remedial Notice aloud to the workers, or have the Notice read by a Board agent in his presence (SA 126).

Overall there can be no doubt that Petitioners' unlawful conduct, including threats of retaliation, threats to close its plant, retaliatory discharges and layoffs, interrogations, and creation of the impression of surveillance, all accomplished in a degrading and reprehensible manner which involved physical assaults, verbal abuse, and literally torrents of obscenity, created an atmosphere of extreme fear and intimidation. The extraordinary remedies ordered by the Board were plainly necessary in order to dispel the effects of this egregious conduct.

III.

IN THE GARMENT INDUSTRY CONTEXT, THE BOARD'S BROAD REMEDIAL AUTHORITY PROPERLY ENCOMPASSED EACH ALTER EGO COMPONENT OF THE SINGLE INTEGRATED ENTERPRISE.

Petitioners' contention that the Board improperly included 144 Spencer Realty Corp. within the scope of its remedial order

because it did not constitute a single integrated enterprise with the other corporate entities is meritless. The Board's factual findings amply demonstrate that Spencer Realty is part of a single integrated enterprise with the other corporate entities by virtue of an utter lack of arms-length relationship between them. Furthermore, Congress has statutorily acknowledged the unique propensity of garment industry enterprises to manipulate the corporate form in order to evade obligations under the National Labor Relations Act. *See* 29 U.S.C. § 158(e). Therefore, given the garment industry context, the lack of arms-length relationship between the companies, and Petitioners' history of manipulation of the corporate form in order to evade the Board's remedial authority, the determination that Spencer Realty was part of Petitioners' single integrated enterprise was appropriate.

Both the single employer and alter ego doctrines permit the Board to impose liability upon separate corporate entities which function as a single integrated enterprise. The Board considers four factors in making a single employer determination: interrelation of operations, common management, centralized control over labor relations, and common ownership. *See Radio & Television Broadcast Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). No one component of this test is controlling, and every factor need not be present. *See Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 25 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983). The specific factual circumstances of each case must be considered, although single employer status always involves an absence of the "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *aff'd on this issue sub nom South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976). Courts have stressed that the cornerstone of single employer status is an "overall control of critical matters at the policy level." *Penntech Papers, Inc.*, 708

F.2d at 25; *Sakrete of Northern California, Inc.*, 332 F.2d 902, 907 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

In order to determine whether two corporate entities are alter egos of one another, the Board considers whether substantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership exist. *See, e.g., NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553-554 (3rd Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984). The alter ego doctrine focuses on an employer's attempt to evade its obligations under the Act, or under a collective bargaining agreement, by means of a "sham transaction or a technical change in operations." *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

These issues have a special resonance here because Petitioners do business within the garment industry. In 1959, Congress enacted the garment industry proviso to Section 8(e) of the National Labor Relations Act, which exempts garment industry firms "performing parts of an integrated process of production" from Section 8(e)'s prohibition against "hot cargo" agreements. 29 U.S.C. § 158(e); *see also R.M. Perlman, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers Union, Local 89-22-1*, 33 F.3d 145, 151 (2nd Cir. 1994). The garment industry proviso was enacted in order to provide the ILG with recourse against widespread manipulation of the corporate form which resulted in the evasion of collective bargaining agreements through the "contracting out" of work previously performed by one company. *See R.M. Perlman, Inc.*, 33 F.3d at 144 ("To avoid being unionized, many inside shop operators stopped making their own goods and instead contracted the work of assembling garments to outside contractors with materials the operator supplied"); *see also Jou-Jou Designs, Inc. v. ILGWU*, 643 F.2d 905 (2nd Cir. 1981); *Danielson v. Coat Suit and Allied Garment Workers Union*, 494 F.2d 1230 (2nd Cir. 1960). The garment

industry proviso recognizes the interrelationship between functional entities in the garment industry, despite the fact that the jobber-contractor interaction is typically an arms-length relationship between entities without common ownership and premises.

Here, Petitioners comprise a single integrated enterprise, or process of production, in the garment industry. Each of the Petitioning corporate entities performed a different garment industry function, selling completed garments to merchants (Skylight), coordinating production (United), sewing the garments (Three Sisters), cutting the garments (Bedford Cutting), and maintaining the physical premises (Spencer Realty). Spencer is owned and managed by the same Jacobowitz family members which own and manage the other corporate entities. Spencer shares the same office space, clerical workers, accounting services, and even filing system with the other corporate entities. The record also demonstrates that Spencer had a less than arms-length relationship with the other Petitioners, including a lack of leases, unexplained periods of rent reduction, and substantial unexplained and unrepaid loans. These findings, none of which are challenged by Petitioners, amply demonstrate that Spencer Realty was both an alter ego of and a single employer with the other Petitioners.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 95-641

In the Supreme Court of the United States

OCTOBER TERM, 1995

THREE SISTERS SPORTSWEAR CO., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's findings that petitioners were part of a single employer for purposes of Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), and that petitioner 144 Spencer Realty Corp. was an alter ego of the other petitioners.

2. Whether the Board acted within its authority in fashioning the remedy in this case.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 55 F.3d 684 (Table). The decision and order of the National Labor Relations Board (S. A. 124a-134a), [1] and the decision of the administrative law judge (S. A. 1a-123a), are reported at 312 N.L.R.B. 853.

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[1] "S. A." refers to the Supplemental Appendix filed with this Court by petitioners.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1995. A petition for rehearing was denied on July 3, 1995. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 2, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1973, Southland Knitwear, Inc. (Southland) and Metropolitan Industries, Inc. (Metropolitan) began manufacturing and distributing knitwear at a facility located at 144 Spencer Street in Brooklyn, New York. S. A. 11a. Thereafter, the International Ladies' Garment Workers' Union (Union) attempted to organize the employees at that facility. In March 1982, the National Labor Relations Board (Board) issued a decision finding that Southland and Metropolitan (collectively, Southland-Metro) were a single integrated enterprise that, acting through its agents Jack Jacobowitz and his children Beirel, David, and Sylvia Jacobowitz, committed "egregious and widespread" unfair labor practices, in violation of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1), (2), and (3). S. A. 6a-7a. In May 1983, Southland-Metro entered into a stipulation with the Board under which Southland-Metro waived its right to seek judicial review of the Board's decision, and agreed to abide by that decision. *Id.* at 7a.

In mid-September 1983, Southland-Metro ostensibly shut down its operations at the 144 Spencer Street facility. Two weeks later, however, Southland-Metro resumed production at the same location under a series of new corporate names. S. A. 28a. Southland-

Metro's sewing machine operators were placed on the payroll of petitioner Three Sisters Sportswear Co. (Three Sisters), and Southland-Metro's cutting department employees were transferred to the payroll of petitioner Bedford Cutting Mills, Inc. (Bedford). *Id.* at 13a, 14a. At about the same time, Jack Jacobowitz created petitioners United Knitwear Industries, Inc. (United) and Skylight Fashions, Inc. (Skylight). *Id.* at 16a-17a. United became the coordinating arm of the resumed Southland-Metro operation: purchasing and cutting were handled by United and Bedford, respectively; sewing, cleaning, hanging, packaging, and shipping were performed by Three Sisters; and sales and collections were conducted by United and Skylight jointly. *Id.* at 17a. Petitioner 144 Spencer Realty Co. (Spencer) owned the 144 Spencer Street building, and shared office space and clerical employees with the other corporations. *Id.* at 23a, 24a.

2. In December, 1988, the Union once again launched an organizing campaign at the 144 Spencer Street plant (S. A. 42a), which resulted in the Union's filing numerous unfair labor practice charges. Based on those charges, the Board's General Counsel issued an amended consolidated complaint against Three Sisters, Bedford, United, and Skylight in June, 1991, alleging that those entities constituted a single integrated business enterprise, and that that single enterprise had committed numerous violations of Section 8(a)(1), (2), (3), and (4) of the NLRA, 29 U.S.C. 158(a)(1), (2), (3), and (4). S. A. 3a-4a.

a. After a hearing, during which the complaint was amended to include Spencer within the alleged single integrated business enterprise (S. A. 4a), the administrative law judge (ALJ) found that Three Sisters,

Bedford, United, Skylight, and Spencer constituted a single employer. *Id.* at 96a.

The ALJ explained that "[s]ingle employer status depends on all the circumstances of a particular case, and is characterized by an absence of an arm[']s length relationship found among unintegrated companies." S. A. 26a-27a. The ALJ also observed that, in making a single employer determination, "the Board considers factors such as interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control," and that "the use of common office facilities, common use of equipment, and family connections between or among the various enterprises" are also "relevant" to the single-employer inquiry. *Id.* at 26a. The ALJ noted that "[n]ot all of these factors must be found to establish the existence of a single employer, and no one factor is controlling." *Ibid.*

Applying those principles, the ALJ found that Three Sisters, Bedford, United, and Skylight constituted a single employer (S. A. 35a), and that Spencer was a part of that single employer. *Id.* at 38a. The ALJ observed that Spencer was "managed and owned by various members of the Jacobowitz family, as [are] the other corporate entities," and that "[h]ere, the evidence supporting the lack of an arm['s] length[] relationship between the parties is substantial." *Id.* at 37a.[2] In concluding that Spencer was part of the

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[2] The ALJ found that "Spencer never obtained any leases from any of the Jacobowitz dominated companies, while requiring leases from other tenants in the building"; that United and Skylight did not pay rent to Spencer; that Three Sisters and Bedford failed to make timely rent payments to Spencer on several occasions, and that "these delinquencies were never satisfied"; that United made loans in excess of

single integrated enterprise, the ALJ rejected petitioners' contention that Spencer could not be deemed part of that single employer because Spencer was a real estate firm, while Three Sisters, Bedford, United, and Skylight were in the business of manufacturing and distributing knitwear. *Id.* at 36a-37a. The ALJ explained that "[n]otwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found particularly where there is evidence of a lack of an arm[']s length relationship between the entities." *Id.* at 37a.

The ALJ also considered "the connection between Southland and Metropolitan and the present companies * * * in order to determine the propriety of the special remedies that [the Union] has requested." S. A. 10a. With regard to that question, the ALJ concluded that an alter-ego relationship existed between Three Sisters, Bedford, United, and Skylight, on the one hand, and Southland-Metro, on the other (*id.* at 31a-32a), and that an alter-ego relationship existed among Three Sisters, Bedford, United, and Skylight. *Id.* at 35a, 96a. The ALJ further found that an alter-ego relationship existed among Spencer, Three Sisters, Bedford, United, and Skylight (*id.* at 38a), inasmuch as Spencer was "managed and owned by various members of the Jacobowitz family, as [are] the other corporate entities," "the dealings between Spencer and the other companies cannot be characterized as

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$20,000 to Spencer, which Spencer never repaid; that, in October 1987, Spencer granted Bedford and Three Sisters "sudden unexplained reductions in rent * * * of 80[%] and 74% respectively"; and that Spencer and the other companies commingled their business records. S. A. 37a.

being at arm[']s length," and "Spencer shares office space, clerical employees and accounting services with the other companies." *Id.* at 37a, 38a.

On the merits of the General Counsel's complaint, the ALJ concluded that petitioners had committed "flagrant and extensive unfair labor practices" in connection with the Union's 1988 organizing campaign. S. A. 107a.[3]

b. The ALJ then turned to the task of fashioning an appropriate remedy for petitioners' unfair labor practices. S. A. 99a-110a. First, the ALJ issued an order requiring petitioners to cease and desist their unfair labor practices, to reinstate and make whole various discriminatees, and to post a customary remedial notice at the Spencer Street plant. *Id.* at

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[3] The ALJ found that petitioners violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by ordering employees not to accept and to rip up Union literature, referring to the Union as the "MAFIA," promising employees benefits to induce them to solicit co-workers to support another union, threatening employees with discharge and plant closure, threatening employees with unspecified reprisals if they spoke with co-workers who supported the Union, interrogating employees about their union sympathies, and creating the impression among the employees that their activities on behalf of the Union were under surveillance. S. A. 96a-97a. In addition, the ALJ found that petitioners' promise of benefits to employees to induce them to solicit their co-workers to support another union was a violation of Section 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2). S. A. at 97a.

The ALJ further found that petitioners violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3), by, among other things, verbally abusing, assaulting, and discharging employees who supported the Union (S. A. 97a-98a), and that petitioners violated Section 8(a)(4) of the NLRA, 29 U.S.C. 158(a)(4), by retaliating against an employee on whose behalf the Union had filed charges with the Board (S. A. 98a).

111a-114a. The ALJ rejected the Union's contention that petitioners should be ordered to reimburse it for its organizing expenses. *Id.* at 106a-107a. Although the ALJ agreed with the Union that "[petitioners] have committed flagrant and serious violations here, and that some of them are similar to the violations found in the prior [1982] case," the ALJ concluded that "[n]either the conduct here [n]or the frequency of the violations" supported an order requiring petitioners to reimburse the Union's organizing expenses. *Ibid.*

The ALJ did find, however, that petitioners' "flagrant and extensive" violations of the NLRA warranted the imposition of notice and access remedies. S. A. 107a-110a. The ALJ explained that "[h]ere, [petitioners] have discriminatorily laid off or discharged five unit employees, including a leading adherent of the [Union], Carmen Nieves." *Id.* at 108a. Petitioners' conduct toward Nieves, the ALJ found, was "particularly reprehensible, inasmuch as it included a barrage of obscenities plus physically blocking her from leaving the office at the time of her discharge, by David and Beirel Jacobowitz[, petitioners'] two highest officials." *Ibid.* The ALJ further observed that "when [petitioners] terminated Bella Martinez, [petitioners] by Beirel also subjected her to humiliating insults (referring to cockroaches and insects), plus a physical assault by removing her chair from under her and pushing her." *Ibid.* The ALJ noted that "[a]dditionally, after unlawfully terminating Rosita Chalston on two occasions, and being forced to reinstate her after an arbitration, [petitioners] continued to discriminate against her in several ways, including the almost inhuman practice of a supervisor clapping his hands whenever she

looked up from her work." *Ibid.* Finally, the ALJ explained that "most of the [Section] 8(a)(1) statements, including threats of discharge and plant closure were made by Beirel," and that "Beirel was also personally involved in the disgraceful conduct * * * at the time of the discharges of Nieves and Martinez, as well as the constructive discharge of [employee Israel] Galarza." *Ibid.*

The ALJ concluded that, under these circumstances, "the mere posting of a notice by [petitioners] will not be sufficient to make employees individually aware of [their] statutory rights and that [their] exercise of such rights will be respected by [petitioners]." S. A. 108a-109a. Accordingly, the ALJ ordered petitioners (in addition to posting a remedial notice at the plant) to publish a copy of the notice, signed by Beirel Jacobowitz, in two local newspapers twice weekly for a period of four weeks, and to mail a copy of the signed notice to current employees "as well as to all employees on their payroll since [petitioners] began their course of unlawful conduct in November of 1989." *Id.* at 109a-110a, 114a-115a. The ALJ also ordered Beirel Jacobowitz to read the signed notice personally to the employees at a meeting (or meetings) to be convened by petitioners for that purpose during working time. *Id.* at 109a, 115a. The ALJ found that it was appropriate to require Beirel Jacobowitz both to sign the notice and to read it to the employees because Beirel was petitioners' "chief executive," and was "responsible for and directly implicated in most of the violations." *Id.* at 109a. Thus, the ALJ explained, Beirel Jacobowitz's signature "directly place[s] on the notice the imprimatur of the person most responsible for the illegal acts in question," and his reading of the notice was neces-

sary to assure the employees that the "unlawful campaign [that] emanated from the top * * * will end * * * from the top." *Ibid.*

The ALJ also ordered petitioners to grant the Union reasonable access to "bulletin boards and all places where notices to employees are customarily posted" in the Spencer Street plant; to grant a reasonable number of Union representatives access to non-work areas of the plant, for reasonable periods of time, in order "to present [their] views on unionization to the employees," during non-work time; and to give the Union reasonable notice of, opportunity to attend, and "equal time and facilities" to respond to, any meeting of employees convened by petitioners at the plant respecting "the question of union representation." S. A. 115a-116a.[4] Finally, the ALJ ordered petitioners to permit the Union to make a 30-minute speech to employees during working time, in the event that the Union participated in a Board election within two years of the date on which petitioners posted the remedial notice at the plant. *Id.* at 116a-117a. The ALJ explained that these plant-access remedies were appropriate because petitioners had engaged in "flagrant and pervasive conduct rendering the possibility of fair election remote." *Id.* at 110a.

3. The Board affirmed the ALJ's single-employer and alter-ego findings, and affirmed the ALJ's remedy with the modification of allowing Beirel Jacobowitz the option of being present while a Board agent read

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[4] The ALJ specified that "[t]hese access provisions * * * shall apply for a period of 2 years from the posting of the notice, or until the Regional Director has issued an appropriate certification following a free and fair election, whichever comes first." S. A. 110a.

the notice to the employees (rather than requiring Jacobowitz to read the notice himself). With that modification,[5] the Board adopted the ALJ's order. S. A. 124a-134a. The Board explained that "[i]n requiring Beirel Jacobowitz to personally read the notice or be present while [it] is read, we emphasize that Beirel Jacobowitz personally committed the majority of the [Section] 8(a)(1) violations and personally engaged in the discriminatory treatment of four of the five discriminatees." *Id.* at 126a. "In view of his pervasive personal involvement in serious unfair labor practices," the Board concluded, "[Jacobowitz's] reading of the notice or his presence while it is read is necessary to dispel the atmosphere of intimidation he created." *Ibid.* The Board further observed that the "special access remedies" that the ALJ afforded the Union "are appropriate and necessary to dissipate the effects of [petitioners'] flagrant and extensive unfair labor practices." *Id.* at 125a-126a (footnote omitted).

4. The court of appeals summarily enforced the Board's order (Pet. App. 1a-3a), "substantially for the reasons set forth in the Board's decision." *Id.* at 2a.

ARGUMENT

Petitioners do not challenge the Board's unfair labor practice findings. They contend, however, that the Board exceeded its remedial authority by ordering the relief at issue in this case, and that the Board erroneously found petitioner Spencer to be part of the single integrated enterprise that violated the NLRA. The court of appeals' decision to enforce the

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[5] The Board made other minor modifications to the ALJ's order, none of which is pertinent here. S. A. 126a-128a.

Board's order was correct, and does not conflict with any decision of this Court or of another court of appeals. The Board's order, moreover, turns largely on the facts of this case. Further review is therefore not warranted.

1. Section 10(c) of the NLRA, 29 U.S.C. 160(c), authorizes the Board, in devising remedies for unfair labor practices, to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." Pursuant to Section 10(c), the Board has "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984); see also *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

In this case, the ALJ found that particularized notice and access remedies were appropriate because petitioners had met the Union's 1988 organizing campaign at the Spencer Street plant with unlawful conduct that was sufficiently "flagrant and pervasive" as to "render[ ] the possibility of fair election remote." S. A. 110a. The Board agreed with the ALJ, stressing that the notice and access remedies that the ALJ ordered were "appropriate and necessary to dissipate the effects of [petitioners'] flagrant and extensive unfair labor practices." *Id.* at 125a-126a (footnote omitted). The courts of appeals, moreover, have consistently held that, in cases involving egregious conduct, the Board acts within its broad remedial authority in ordering the employer to undertake notice and access measures of the kind at

issue here.[6] Accordingly, based on the facts of this case, the court of appeals correctly enforced the Board's order.

a. Petitioners' principal contention (Pet. 11) is that "[t]he Board's [f]ailure [t]o [c]onsider [t]he [e]ffects [o]f [t]he [p]assage [o]f [t]ime [b]etween [v]iolations [o]f [t]he Act [a]mounts [t]o [a]n [a]buse [o]f [t]he Board's [r]emedial [a]uthority." That contention lacks merit.

Petitioners assert (Pet. 11-12) that "Southland-Metro's relationship with the petitioners weighed heavily in the equation in assessing the remedies to

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[6] See, *e.g.*, *NLRB* v. *S.E. Nichols, Inc.*, 862 F.2d 952, 960, 962 (2d Cir. 1988) (notice to be read by company's president or Board agent, at employer's option; union granted reasonable access to company bulletin boards, equal time to respond to company speeches about union representation, and opportunity to make a 30-minute pre-election speech), cert. denied, 490 U.S. 1108 (1989); *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1384-1385 (D.C. Cir. 1983) (notice to be published in local newspapers; union granted access to company bulletin boards and employees in non-work areas during non-work times, equal time to respond to company speeches about union representation, and opportunity to make 30-minute pre-election speech during work time), cert. denied, 467 U.S. 1241 (1984); see also *Haddon House Food Products, Inc.* v. *NLRB*, 764 F.2d 182 (3d Cir. 1985), cert. denied, 475 U.S. 1011 (1986). In such cases, notice and access remedies "effectuate the policies of th[e] [Act]," 29 U.S.C. 160(c), because the notice component of the remedy serves "to inform the employees of their statutory rights and the legal limits on the [e]mployer's conduct, and to reassure them that further violations will not occur," while the access component is "designed to assist the [u]nion in communicating with the employees, and to assist the employees in hearing the [u]nion's side of the story without fear of retaliation." *Teamsters Local 115* v. *NLRB*, 640 F.2d 392, 399-400 (D.C. Cir.), cert. denied, 454 U.S. 827 (1981).

be imposed upon the petitioners—even though more than eight years had passed with no intervening violations," and that "[i]n failing even to consider this eight-year 'clean period,' the Board exceeded the scope of its authority and impermissibly imposed measures decidedly more punitive than remedial." See also *id.* at 3. Contrary to petitioners' assertions, however, the Board did not consider petitioners' alter-ego relationship with Southland-Metro, or the unfair labor practices that the Board previously had found Southland-Metro to have committed (see S. A. 6a-7a), in its decision to order notice and access remedies in this case. Rather, the ALJ deemed that past conduct to be relevant only to the question whether, as the Union urged, the Board should order petitioners to reimburse the Union for its organizing expenses. *Id.* at 106a-107a. While the ALJ concluded that the nature and frequency of Southland-Metro's and petitioners' conduct, taken together, did not warrant a reimbursement remedy (a conclusion that the Board was not asked to review), both the ALJ and the Board found that notice and access remedies were nonetheless appropriate because of the nature and extent of petitioners' own unfair labor practices. *Id.* at 107a-110a, 125a-126a.[7]

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[7] In any event, the Board's finding that petitioners have an alter-ego relationship with Southland-Metro further supports the Board's remedial order. Petitioners are recidivist violators of the NLRA; their egregious and pervasive unlawful conduct was a continuation of the same type of unlawful conduct in which Southland-Metro engaged in response to the Union's earlier effort to organize the employees at the Spencer Street plant. The fact that a period of years passed without intervening violations is attributable to the fact that it was not

Petitioners further contend (Pet. 12-15) that, because they are "first offender[s]," the Board abused its discretion in ordering notice and access remedies that, according to petitioners, are "typically reserved for the most hardened recidivists." Pet. 13. Petitioners' argument rests on the erroneous assumption that the Board's authority to issue particularized notice and access remedies is limited to cases of recidivist violators. The Board's authority is not so limited, nor has the Board in practice applied such remedies only to recidivists. See, *e.g.*, *Conair Corp.* v. *NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984); *Teamsters Local 115* v. *NLRB*, 640 F.2d 392 (D.C. Cir.), cert. denied, 454 U.S. 827 (1981); *United Supermarkets, Inc.*, 261 N.L.R.B. 1291 (1982). In light of petitioners' undisputed commission of "flagrant and extensive" unfair labor practices, and the conclusion by the ALJ and the Board (S. A. 110a, 125a-126a) that petitioners' conduct had rendered "the possibility of fair election remote" (*id.* at 110a), the use of particularized notice and access remedies to dissipate the effects of that conduct was well within the Board's remedial authority.

b. Petitioners also contend (Pet. 16) that "the outcome here directly affronts the principles" of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In *Babcock & Wilcox*, the Court held that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees

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until December, 1988, that the Union resumed its organizational efforts at petitioners' plant.

with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. The rule of *Babcock & Wilcox*, however, does not delimit the scope of the Board's *remedial* authority under Section 10(c) of the NLRA; rather, that decision governs the extent to which an employer's refusal to afford non-employee union organizers access to its property may be deemed an unfair labor practice under Section 8(a)(1). See *NLRB* v. *S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2d Cir. 1988), cert. denied, 490 U.S. 1108 (1989); *Teamsters Local 115*, 640 F.2d at 400.

Petitioners nonetheless assert (Pet. 17) that, because the employer has a property interest in the premises of its plant, this Court "should mandate that the Board sustain a heightened burden of making a 'clear showing' of the necessity for such extraordinary relief, as a prerequisite for authorizing broad plant access." Neither this Court nor any court of appeals has ever found such a "heightened burden" to be necessary or appropriate. As we have explained, moreover, the Board orders special access remedies only in those exceptional cases where the employer's violations are so egregious that the adverse consequences of its conduct cannot effectively be remedied by traditional means. In light of the "flagrant and pervasive" violations committed by petitioners, the Board reasonably concluded that this was such a case.[8]

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[8] Petitioners suggest (Pet. 17-18) that the decision below is inconsistent with the court of appeals' prior ruling in *United Steelworkers of America* v. *NLRB*, 646 F.2d 616 (D.C. Cir. 1981). In *United Steelworkers*, the court confirmed that "the Board has a broad authority to use access as a remedial measure if such a remedy is necessary to offset coercive effects caused

2. Contrary to petitioners' contention (Pet. 19), the Board did not rely solely on its finding of common ownership in determining that petitioner Spencer was part of the single employer in this case. Rather, the Board found Spencer to be part of the single employer entity because Spencer was "managed and owned by various members of the Jacobowitz family, as [are] the other corporate entities," and because there was "ample evidence in the record to support the conclusion that the dealings between Spencer and the other companies cannot be characterized as being at arm['s] length." S. A. 37a, 38a. The Board thus applied established law, see *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), to the particular facts of this case. Its fact-intensive conclusion that the criteria for single-employer status were satisfied here does not warrant further review.[9]

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by unlawful employer action." 646 F.2d at 639. The court concluded, however, that a remand was necessary in that case to enable the Board to explain why a corporate-wide remedy was necessary. *Id.* at 640-641. Here, by contrast, the ALJ and the Board fully justified the imposition of an access remedy through extensive factual findings. In any event, an intra-circuit conflict of the kind alleged by petitioners would not warrant this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[9] Petitioners also assert, without discussion, that "for the same reasons, the Board's determination that Spencer Realty was an alter ego of the petitioners was also in error." Pet. 22 n.15. The Board's alter-ego finding with respect to Spencer was not based solely on the fact that all petitioners share common ownership. As the ALJ explained, Three Sisters, Bedford, United, and Skylight took over operations at the Spencer Street plant "to avoid the backpay obligations of Southland-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Metro"; Spencer shared common ownership and management with Three Sisters, Bedford, United, and Skylight; and Spencer did not maintain arm's-length relationships with those entities. S. A. 35a, 37a-38a. The Board's finding that Spencer was an alter ego of the other petitioners—a finding that Member Raudabaugh concluded he need not even reach in concurring in the Board's order in this case (see S. A. 125a n.4) —does not warrant this Court's review.